No. 227.

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JAMES H. McKEN

Brief of Greene for P. E.

In Supreme Court of the United States.

October Term, 1898.

No. 227.

Filed Mar. 6, 1899.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, . . *Plaintiff in Error,*

AGAINST

HENRY C. SMITH, . *Relator and Defendant in Error.*

BRIEF OF PLAINTIFF IN ERROR.

GEORGE C. GREENE,
Of Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR, *vs.* HENRY C. SMITH, RELATOR, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

ERROR TO SUPREME COURT OF MICHIGAN.

STATEMENT.

This case comes to this court upon a writ of error to the Supreme Court of the State of Michigan, from the judgment of that court, affirming the order and judgment of the Circuit Court of Lenawee County, which awarded a peremptory writ of mandamus requiring the plaintiff in error "to issue to said relator, upon payment or tender to it, or to its ticket agent in charge of its ticket office, at Adrian, Michigan, of twenty dollars, lawful money of the United States, a thousand-mile ticket, in the name of said Henry C. Smith, and his said wife, as required by the Act of the Legislature of the State of Michigan, mentioned in the petition herein, being Sub-division 9 of Section 9, of Article II, of Chapter 91, of Howell's Annotated Statutes, as amended by Act No. 90, of the Public Acts of 1891. That said ticket shall be good upon and limited to the railway lines operated by respondent within the State of Michigan." (Record, p. 14.)

The case was heard in the Circuit Court upon the petition, answer and reply, which appear in the Record at pages 7, 9, 13, respectively. Therefore, the facts stated in the answer were and are to be taken as true.

The *Petition* (p. 7) stated that respondent is a private corporation, operating a railroad in Michigan and several other States.

That under the statute above referred to, it was its duty to keep for sale at Adrian, "one-thousand-mile tickets at a price not to exceed twenty dollars," and "if required by the purchaser, to issue such tickets in name of such purchaser and his wife, * * * which ticket shall be valid for two years after date of purchase."

That relator tendered to the ticket agent at Adrian, twenty dollars, "and demanded that said agent issue to your petitioner a one-thousand-mile ticket in the name of your petitioner and of his wife, Emma Watts Smith, as provided by the above-mentioned statute," and the agent refused.

It is not alleged that the ticket demanded was to be limited to the State of Michigan, but the demand alleged was broad enough to cover ticket good in all States.

In the *Answer* it is alleged that respondent owns and operates a railroad between Chicago and Buffalo, passing through States other than Michigan, " and also a line of railroad which extends from said first-mentioned railroad at Elkhart, Indiana, to Monroe, Michigan, with a branch line from Lenawee Junction on said line," to the City of Jackson. (Record, p. 9, par. 1.)

It does not appear by the petition, answer or reply that respondent owns or operates in Michigan any other railroad than that above stated and described.

In the answer it is also alleged that all of said railroad formerly belonged to the Michigan Southern Railroad Company, a corporation organized and existing under a special charter, granted by Act No. 113, Laws of Michigan, passed in 1846. Several consolidations are alleged, whereby the respondent company was formed, and it is alleged that thereby respondent acquired and is entitled to hold all the rights, franchises, powers, property and privileges granted in and by said special charter and

acts of the Legislature of Michigan, to said Michigan Southern Railroad Company and the Michigan Southern & Northern Indiana Railroad Company. (Record, p. 10, par. 2, 3, 4, 5.)

Also that under said charter the Michigan Southern Railroad Company had the power and authority to charge, and did charge, for transportation of passengers over its said railroad three cents per mile, and that rate has ever since been maintained, and this respondent has had and still has power and authority to make such charge, and said charter is now in full force and effect, and applies to respondent. (Record, p. 10, par. 6.)

It is also alleged that relator's demand was for a ticket which would entitle him and his wife to transportation over the whole line of respondent's road in and out of the State. (Record, p. 11, par. 7.)

It is alleged that the Act of 1891 has no application to that portion of respondent's line which was owned by the Michigan Southern Railroad Company, or to its lines outside the State of Michigan. (Record, p. 11, par. 9.)

Also, that said act is a regulation of interstate commerce, and in contravention of Article I, Section 8, of the Constitution of the United States. (Record, p. 11, par. 16.)

Also, that said act is so uncertain and indefinite, that it is impracticable of construction or enforcement.

The *Reply* states that relator does not understand or claim the statute regulates the rate of charge or kind of ticket he shall have or use outside of Michigan, and only asks that the respondent comply with it in Michigan. (Record, p. 13.)

The case was heard upon the pleadings, no proofs being offered.

The Circuit Court granted the writ of mandamus and its decision appears in full at page 14 of the Record.

A writ of certiorari issued from the Supreme to the Circuit Court, and the judge of the latter made his return, which appears at page 16 of the Record.

The cause was argued and submitted in the Supreme Court, in June, 1896, and decided in October, 1897, by a divided court, three judges being in favor of and two against affirmance.

The opinion of the majority (Record, pp. 19–28) being silent upon the question arising under the State Constitution, which was presented and argued at length by counsel, and discussed in the dissenting opinions (Record, pp. 29–41), the defendant company filed its petition for a rehearing. (Record, pp. 42–48.)

The Court denied the application, without delivering any opinion (p. 55).

The Supreme Court ordered and adjudged that the order of the Circuit Court be affirmed (p. 55); and also ordered that it be certified and be made a part of the record and decree that in the rendition of such order and decree it became and was necessary and material to the case to determine whether the Act in question is in violation of or repugnant to Article XIV, or the Eighth Section of Article I, or the Tenth Section of Article I, of the Constitution of the United States, and that the respondent claimed the Act was in violation of and repugnant to such constitutional provisions, but the Court held and decided against such claims (p. 55–6).

So much of the Charter of the Michigan Southern Railroad Company and other acts of the Michigan Legislature as may be material in the consideration of the case, appear in the Appendix to this brief, and are hereinafter referred to.

The Constitution of Michigan, Article XIX, A, Section 1, is in the following words:

"Section 1. The legislature may, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight

on different railroads in this State, and shall prohibit running contracts between such railroad companies whereby discrimination is made in favor of either of such companies as against other companies owning connecting or intersecting lines of railroads."

The Act of 1891, in question, *first establishes maximum rates* for the transportation of passengers, and then goes farther, as follows: (App. p 37.)

"*Provided, further*, That one-thousand-mile tickets shall be kept for sale at the principal ticket offices of all railroad companies of this State or carrying on business partly within and partly without the limits of this State, at a price not exceeding twenty dollars in the Lower Peninsula and twenty-five dollars in the Upper Peninsula. Such one-thousand-mile-tickets may be made non-transferable, but whatever required by the purchaser, they shall be issued in the names of the purchaser, his wife and children, designating the name of each on such ticket, and in case such ticket is presented by any other than the person or persons named thereon, the conductor may take it up and collect fare, and thereupon such one-thousand-mile ticket shall be forfeited to the railroad company. Each one-thousand-mile ticket shall be valid for two years only after date of purchase, and in case it is not wholly used within the time, the company issuing the same shall redeem the unused portion thereof, if presented by the purchaser for redemption within thirty days after the expiration of such time, and shall on such redemption be entitled to charge three cents per mile for the portion thereof used."

Specification of Errors.

The errors assigned in the Record (p. 59–60), upon which the plaintiff in error relies, are as follows:

1. That the Supreme Court of the State of Michigan erred in holding and determining that the act of the Legislature of the State of Michigan mentioned in the petition in this cause, being Subdivision 9, Section 9, of Article II of the General Railroad Laws of the State of Michigan, as amended by Act No. 90 of the public acts of 1891, is not in violation of or repugnant to Article

XIV of the amendments of the Constitution of the United States, which provides, "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

2. That the said Court erred in holding as to respondent that the requirement of said act of the Legislature of the State of Michigan that respondent should sell tickets good for the transportation of the purchaser and his family for two years at a rate of fare of two cents per mile is not in violation of or repugnant to Article 14 of the amendments of the Constitution of the United States, which provides, "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor to deny any person within its jurisdiction the equal protection of the law."

3. That the said Court erred in holding and determining that the said act of the Legislature of the State of Michigan is not in violation of or repugnant to Section 8, Article I, of the Constitution of the United States, which declares that "the Congress shall have power * * * to regulate commerce among the several States."

4. That the said Court erred in holding that the said act of the Legislature of the State of Michigan in question, as applicable to this respondent, a corporation existing under a special charter granted by the State of Michigan to it in 1846, mentioned in the opinion of said Court, is not in the respects wherein it affects the rights of this respondent under said charter in violation of or repugnant to Article I, Section 10, of the Constitution of the United States, which prohibits a State from passing any law impairing the obligation of contracts.

5. That the said Court erred in holding that the said act of the Legislature of the State of Michigan, as applicable to that portion of respondent's road which it holds as successor of the Michigan Southern Railroad Company, and which that company acquired by purchase from the State under and by virtue of the contract of bargain and sale contained in the special charter of that company in 1846, is not in the respects wherein it affects the rights of the respondent as to such portion of

said road under said charter in violation of or repugnant to said Article I, Section 10, of the Constitution of the United States, which prohibits a State from passing any law impairing the obligation of contracts.

6. That it appears by the record in said cause that the petition in said cause should have been denied.

7. That the judgment in said cause was given for the said defendant in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff in error and against the said defendant in error.

And the said plaintiff in error, for the errors aforesaid and for other errors appearing in the record and proceedings in said cause, prays that the judgment aforesaid may be reversed and held for nothing, and that it may be restored to all things which it may have lost by occasion of said judgment.

POINTS AND ARGUMENT.

FIRST POINT.

The statute sought to be enforced is in violation of the provision of the Fourteenth Amendment of the Constitution of the United States, which declares that no State shall deprive any person of liberty or property without due process of law.

The right and privilege of contracting is both a liberty and a property right.

The act attempts to compel railroad companies to agree to part with their property and services at a fixed rate, at a date in the future when such fixed rate may be wholly unremunerative and a greater rate may be authorized by law; in other words, to agree to part with their property and render service without reference to its value at such future time.

The contracts the company is required to enter into are property. They represent the right to use the road and demand and receive from the company services of value, not only by the person applying for the ticket but other persons unknown to the company.

If partly unused, they still have a cash value, which the company is required to pay therefor.

If the company should retire from business before the expiration of the time specified in the contract, it would still be liable upon it, and bound to perform. The option to cancel the contract is only given to the person holding the ticket, and at his option only may the company purchase or redeem the unused portion.

If by statute the company may be compelled to enter into contracts to grant the use of its property and perform services at a fixed rate for a term of years, it may likewise be compelled to grant to individuals the use of any of its property for any length of time and upon such terms as the legislature sees fit to impose.

I insist that the legislature has no power to require a railroad company *to enter into a contract* the effect of which may be to deprive the company of the right to charge and receive the maximum rates, in all cases, which may be established from time to time, or modified at any time the legislature may see fit to act.

The power to require corporations to enter into executory contracts with its patrons, binding it to perform certain service for a term of years, at a fixed rate, vastly exceeds the power to simply establish maximum rates.

If this act is upheld, it must follow that the legislature has power to require and compel railroad companies to enter into contracts with shippers to transport their freight for a term of years to come, at a fixed rate, and the companies would be bound by such contracts, although, before the expiration of the contract period, rates were greatly increased by the legislature.

The companies may *voluntarily* enter into contracts for transportation of persons and property running for such time as may be agreed upon, keeping within the rates fixed by law, and not unjustly discriminating, but *they cannot be compelled* to enter into such contracts. They discharge their whole duty, which may be or is imposed by law, when, upon payment of the established rate or fare, they receive and in due season transport the person or property to its destination. What to-day may be a reasonable rate, may, a year hence, be unremunerative, and there is no power in one legislature to so establish rates or fares in any case by requiring the companies to enter into contracts, or otherwise, or as between any individual and any company, that it or a subsequent legislature may not, at any time and from time to time, change them.

The effect of the act, if valid, would be to compel the railroad company to bind itself *by contract* with individuals not to avail itself of the benefits of subsequent legislation or of the constitutional provision conferring upon the legislature the power to *from time to time* establish rates, and the legislature would be unable to relieve the company from the obligation of the contract. It would deprive the company of the liberty to contract in relation to the service for the two years covered by the ticket.

The counsel for the relator in the briefs filed in the court below conceded, and I submit it cannot be controverted, that if he was right in his contention, then the legislature can require railway companies to make executory contracts to be performed in the future, running for a period of ten, twenty or thirty years; modified only "by the condition that the time fixed must always be within the bounds of reasonable discretion," or "provided such period is not beyond the bounds of reasonable legislative discretion."

He also conceded that, if he was right, the legislature can compel companies to make express contracts running

into the future for the transportation of freight, and that "such power is only limited by the bounds of reasonable legislative discretion."

This is equivalent to declaring that the legislature has absolute and unlimited power to require companies to enter into such contracts for such rates and periods of time as to the legislature shall seem reasonable. A more despotic or arbitrary power it is hard to conceive.

In Allegeyer *vs.* Louisiana, 165 U. S. 578, it was held:

"The liberty mentioned in that amendment (14th) means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to *embrace the right of the citizen to be free* in the enjoyment of all his faculties, to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose *to enter into all contracts which may be proper, necessary and essential* to his carrying out to a successful conclusion the purposes above mentioned."

In People *vs.* Marx, 99 N. Y. 386, the Court (Rapallo, J.) says:

"And the Fourteenth Amendment to the Constitution of the United States provides that 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These constitutional safeguards have been so thoroughly discussed in recent cases that it would be superfluous to do more than to refer to the conclusions which have been reached bearing upon the question now under consideration. Among these no proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit. (Live Stock Association *vs.* The Crescent City, etc., 1 Abb. (U. S.) 398; Slaughter House cases, 16 Wall. 106; Corfield *vs.* Coryell, 4 Wash.

C. C. 380; Matter of Jacobs, 98 N. Y. 98.) The term 'liberty,' as protected by the Constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but it is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such *restraints* as are necessary for the common welfare. In the language of Andrews, J., in Bertholf *vs.* O'Reilly, 74 N. Y. 515, the right to liberty embraces the right of man 'to exercise his faculties and to follow a lawful avocation for the support of life,' and as expressed by Earl, J., in *In re* Jacobs, 'one may be deprived of his liberty, and his constitutional right thereto violated, without the actual restraint of his person. Liberty in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation.'"

Can it be said that a law which *compels* a citizen *to enter into a contract* of service, running through two years, does not interfere with such liberty?

If the law should be repealed the day after the contract, in pursuance of its requirements, is executed, and another law enacted which would entitle the citizen to receive greater compensation for his service, he would still be bound by the contract he had made, and his liberty to contract be denied him.

The right of railroad companies to make reasonable regulations and contracts in relation to their business is supported by an unbroken line of authorities, and such right is subject to certain limitations, restrictions or prohibitions, but nowhere has it been held that the State has the power to compel companies to make such contracts as are required in this case.

In Elmore *vs.* Sands, 54 N. Y. 512, it was held "that a railroad company has a right to provide and insist that its passenger tickets shall be used upon the day when issued." "Whether a ticket is to be regarded as evi-

dencing a contract, or as a token or voucher for the payment of fare only, the effect is the same." "Railroad companies carrying passengers have the right to make reasonable rules and regulations for conducting their business."

In Barker *vs.* Coffin, 31 Barb. (N. Y.) 556, it was also held, and among the reasons assigned in support of the holding are, that unless the company has this right it will have no means to protect against overloading, and the right of passage may be claimed by such numbers on a particular day or occasion as to render it impossible for the carrier to perform his contract. "The contract for passage may be made at a time when the fare by the stage or *cars is very low and its execution claimed* at a future time *when the reasonable fare is much higher.*"

To the same effect see:

State *vs.* Campbell, 32 N. J. L. 309.
B. & L. R. Co. *vs.* Proctor, 1 Allen, 267.
Bawitzky *vs* R. Co., 40 L. Ann. 50.

In the last case cited the Court say: "All the writers on railroad law, and numerous decisions of the courts of the country, concede the right of common carriers to include such restriction in their contracts for the transportation of passengers."

In Dietrich *vs.* Penn. R. Co., 71 Pa. St., the Court say: "The authorities, as well as the reason of the thing, show that the company must make its own regulations."

In Pennington *vs.* Phil., W. & B. R. Co., 62 Md. 95, it is said: "A passenger has a right to be conveyed in the cars of a railroad company without making any special contract for transportation. Upon payment of the usual fare the company is bound to convey him, and is under all the obligations imposed by law on common carriers so far as they relate to the transportation of him as a passenger. *It is competent to vary these obligations by a special* agreement, on valuable consideration, between the passenger and the company. *But if the passenger chooses*

to do so he may stand on his legal rights and elect to be carried to his destination without making any special contract. Before the ordinary liability of the railroad company can be varied there must be a consent of the purchaser, founded on a valuable consideration. The ticket is ordinarily only a token showing that the passenger has paid his fare."

This case quite clearly states the rights and duties of the railroad company as a common carrier of passengers. It is bound to receive and carry the passenger within a reasonable time upon receiving payment therefor (Hutchinson on Carriers, section 538); but if a different or other duty or condition is to be imposed upon the carrier or passenger it must be by contract, which passenger or carrier may or may not make at their election.

If the legislature can require railroad companies to make such contracts, it can require natural persons to do so.

In the court below relator's counsel controverted this proposition upon the ground that as to railroad companies the Constitution authorizes the legislature to fix maximum rates, while there is an absence of such provisions as to individuals. If he stands on the constitutional provision as to railroads, it is respectfully submitted that *it* does not give the legislature power to require such executory contracts but only to fix maximum rates. If he stands on the inherent powers of the legislature, how can he distinguish between the right to exercise this power against a railroad company or an individual who is engaged in the business of a common carrier or any other business charged with a public interest? The authorities do not make such distinction.

In Peck *vs.* Ch. & N. W. R. Co., 94 U. S. 165, referring to Munn *vs.* Ill., it is said:

"Where property has been clothed with a public interest the legislature may *fix a limit* to that which shall in law be reasonable for its use."

This rule applies to individuals as well as corporations, as was held in the Munn case, and it is as far as any courts have ever gone in declaring the power of the legislature. No case has been cited, nor, I think, can be found, where it has been held that the legislature could compel the owner or operator of mill, elevator, ferry, stage coach, or railroad, to *enter into a contract* to perform service for a term of years at a fixed rate of compensation.

The legislature or State has no power to compel the citizen or aggregation of citizens forming the corporation to continue in the particular business or to contract to do so.

The act in question in effect requires the railroad companies to agree to continue in the business, so as to perform the contract for at least two years.

Without here questioning the power of the legislature to limit the charge for services rendered in a public employment, or for the use of property in which the public has an interest, I insist that that is the extent of its power in that behalf, and it has no power to go beyond and compel any person or corporation to agree to continue business at the prices fixed, or otherwise. Certainly not where the Constitution of the State, as here, provides that the legislature may *at any time* change or increase the lawful rates.

In Chicago, etc., R. Co. *vs.* Iowa, 94 U. S. 155, 161, Chief Justice Waite, in delivering the opinion of the Court, distinctly holds that an individual engaged in a public employment affecting the public interest, is subject to the same legislative control as is a railroad company. *That the company has power to contract in reference to its business the same as private individuals. That is in substance its charter, and to that extent it is protected*

as by a contract, and that it is too late to contend the charter is not a contract within the meaning of the clause of the Constitution which prohibits a State from passing a law impairing the obligation of a contract. That the "company, in the transaction of its business, has the same rights, and is subject to the same control, as private individuals under the same circumstances. It must carry when called upon to do so, and charge only a reasonable sum for the carriage."

The relator's counsel sought to bring to his support the principle that "the legislature has all the incidental and instrumental powers necessary and proper to carry into effectual execution all the express powers," but he does not tell us how or why in order to "establish maximum rates from time to time," it is necessary to require that the companies must enter into contract to adhere to such rates for a term of years, regardless of what maximum rates, fixed by the legislature, may be from time to time during the term.

By the first part of the act in question the legislature establishes maximum rates, but by the provisions in question, which follow, it requires the companies to enter into contracts binding them to accept less than the minimum rate, for two years.

The power here sought to be exercised is not legislative in its nature, nor within the scope of legislative authority.

In Commonwealth *vs.* Maxwell, 27 Pa. St. 444, it was held:

"A law that is unconstitutional, is so because it is either an assumption of power not legislative, or because it is inconsistent with some provision of the Federal or State Constitution."

In Hanson *vs.* Vernon, 27 Iowa, 28 (1 Am. Rep. 215), Dillon, J., says:

"It is a well-settled principle of American Constitutional Law that an act of the legislature may be unconstitutional in two ways: 1st, because it *assumes* or seeks to confer power *not legislative* in its nature; or, 2d, because it violates some specific provision of the State or National Constitution."

Citing 27 Pa. St. 444, 30 Id. 9–37; Sedgwick Const. Law, 174–5, 515; 4 Hill, N. Y. 140.

In Taylor *vs.* Porter, 4 Hill, 140–143, Bronson, J., says:

"*The power of making bargains for individuals has not been delegated to any branch of the government. It is not to be presumed that such a power exists, and those who set it up should tell where it may be found.*"

"Under our form of government the legislature is not supreme. It is only one of the organs of that absolute sovereignty which resides in the whole body of the people. Like other departments of the government, it can only exercise such powers as have been delegated to it; and when it steps beyond that boundary, its acts, like those of the most humble magistrate in the State who transcends his jurisdiction, are utterly void. Where, then, shall we find a delegation of power to the legislature, to take the property of A and give it to B, either with or without compensation? Only one clause of the constitution can be cited in support of the power, and that is the first section of the first article, where the people have declared that the 'legislative power of this State shall be vested in the senate and assembly.' It is readily admitted that the two houses, subject only to the qualified negative of the governor, possess all the legislative power of this State; but the question immediately presents itself, what is that 'legislative power,' and how far does it extend? Does it reach the life, liberty or property of a citizen who is not charged with a transgression of the laws, and when the sacrifice is not demanded by a just regard for the public welfare? In Wilkinson *vs.* Leland (2 Peters, 657), Mr. Justice Story says: 'The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least, no court of justice in this country would be warranted in assuming that the

power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and direct expressions of such an intention.' He added: "We know of no case in which a legislative act to transfer the property of A to B without his consent, has ever been held a constitutional exercise of legislative power in any State in the Union On the contrary, it has been constantly resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced.' (See also 2 Kent's Com. 13, 340, and cases there cited.) The security of life, liberty and property, lies at the foundation of the social compact; and to say that this grant of 'legislative power' includes the right to attack private property is equivalent to saying that the people have delegated to their servants the power of defeating one of the great ends for which the government was established. If there was not one word of qualification in the whole instrument, I should feel great difficulty in bringing myself to the conclusion that the clause under consideration had clothed the legislature with despotic power; and such is the extent of their authority, if they can take the property of A, either with or without compensation, and give it to B. 'The legislative power of this State' does not reach to such an unwarrantable extent. Neither life, liberty nor property, except when forfeited by crime, or when the latter is taken for public use, falls within the scope of the power."

"*Due process of law* means more than a special act passed for the very purpose of deprivation; it means the general law in its regular course of administration through the courts of justice, a law which hears before it condemns, proceeds upon inquiry, and renders judgment only on trial."

Clarke *vs.* Mitchell, 64 Mo. 564.

"If it has no broader meaning than process prescribed by act of the legislature, it is the end of the case. But such a construction would render the constitutional guar-

antee mere nonsense; for it would then mean no State shall deprive a person of life, liberty or property unless the State shall choose to do so."

In re Ziebold, 19 Rep. (U. S. Cir.) 742.

Conceding the right of the legislature to prohibit the making of unreasonable contracts, yet it does not follow that it has the right to require us to enter into contracts.

"There are certain fundamental rights of every citizen which are recognized in the organic law of all our free American States. A statute which violates any of these rights is unconstitutional and void, even though the enactment of it is not expressly forbidden. * * * The right to acquire, possess and protect property includes the right to make reasonable contracts, which shall be under the protection of the law."

Commonwealth *vs.* Perry, 115 Mass. 117.
Wheeling Bridge and Terminal R. R. R. Co. *vs.* Gilmore, 8 Ohio C. C. R. 658.

In Braceville Coal Co. *vs.* The People (Ill. Sup. Ct.), 35 N. E. Rep., 62, 63, it is said: "Property in its broader sense is not the physical thing which may be the subject of ownership, but is the right of dominion, possession and *power of disposition* which may be acquired over it. * * * *The privilege of contracting is both a liberty and a property right.*"

"In a broader sense, a right of action is property; *so is a mere right to use or possess*, if it be a right as against the general owner, but is usually termed *special property* to distinguish it from the right of the general owner which is termed the general property. The entire property is the exclusive right of possessing, enjoying and disposing of a thing."—Century Dict.

Property is defined to be "any object of value that a person may lawfully acquire or hold; anything that may be owned."—Standard Dict.

The relator's counsel below, in support of his contention, referred to the power of the legislature to establish

the rate of interest, as being a like exercise of power. It doubtless has that power, as it also has power to establish maximum rates for transportation, but to maintain his position he must also maintain that the legislature has power to require and compel banking corporations, creatures of its creation, to enter into contracts with individuals that for a term of years they will loan them moneys and will charge only a specified rate of interest upon such loans, regardless of the maximum rate, which may be fixed from time to time by act of legislature. There is nothing in the laws fixing the rate of interest that would interfere with the right of parties to contract for payment of the rate of interest upon loans established at the time of making the contract, or which might be there, after fixed by law, but here the railroad company is required to contract at the rate now fixed, and cannot have the benefit of an increased rate, subsequently established, nor of the maximum rate established by law in case the mileage clause of the statute should be repealed. The laws regulating interest do not require or compel banks to loan money at the prescribed rate, and it is not within the legislative power to do so. It may say they shall not charge for use of their money rates of interest exceeding those established by law, and so it may say that railroad companies shall not charge for the use of their property or their service more than the maximum rates established by law, and that is the limit and extent of its power in that behalf.

I beg to submit, in addition to the foregoing upon this point, the following from the brief of Mr. Ashley Pond in this case, in the State Supreme Court:

"THE STATUTE OF 1891 IS UNCONSTITUTIONAL AND INVALID.

"It is an attempt on the part of the legislature to compel railroad companies to enter into express contracts to be performed in the future at any time within two years, at the option of the other party to the contract. Now,

"1. If the legislature can require railroad companies to make express contracts, running for a period of two years, it can require them to make contracts running for a period of ten years, or twenty years, or thirty years.

"2. If the legislature can require railroad companies to make express contracts running into the future for the transportation of passengers, it can require them to make like contracts with reference to the transportation of freight.

"3. If the legislature can require railroad companies to make contracts running into the future, it can require natural persons to do so.

"It may be contended in answer to this proposition, that the power which a legislature possesses to require railroad companies to make contracts of the kind under consideration, springs from the power reserved to alter, amend or repeal the charters of such companies or the laws under which they are organized.

"Now, if this were true, for a reason already stated, to-wit: that the charter of the respondent company is not subject to amendment or repeal, except upon payment of damages, it could have no application here.

"But the proposition is not true.

"The power of the legislature to legislate with reference to rates which railroad corporations shall charge for carrying their passengers or freight, does not grow out of the fact that such corporations are created by the legislature, but out of the fact that the public is interested in the business which such corporations carry on.

Munn *vs.* Ill., 94 U. S. 113.

"Now the public is just as much interested in the business of a common carrier when carried on by a natural person, as it is interested in such business when carried on by a person created by the legislature; and it follows, therefore, as I have above suggested, that if the legislature can compel a corporation to enter into a contract with

reference to transportation of passengers or freight, it can compel a natural person carrying on the business of a common carrier, to do the same.

"But to compel a person to enter into a contract for future action on his part of any kind is *not a governmental function*, and hence the legislature has no more power in that regard than it would have if its existence were negatived by an express provision of the constitution.

"Apt, in this connection, is the language of Black, C. J., in Sharpless *vs.* Mayor, 21 Penn. St. 165:

"'I do not say, however, that a contract between two individuals, or between two corporations, can be made by the legislature. Besides, it would be impossible in the nature of things, for the essence of a contract is the agreement of the parties.'"

SECOND POINT.

The Act of 1891 in question is in violation of Article I, Section 10 of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts, if, as was held by the court below, it applies to the railroad formerly held by the Michigan Southern Railroad Company under its special charter.

That charter was a contract between the State, the vendor of the railroad, and the Michigan Southern Railroad Company, the purchaser.

The plaintiff in error is the successor of that company, and has acquired and is possessed of all the rights, powers and privileges to which that company was entitled under such charter and contract, among which was, and is, the right to charge and receive three cents per mile for transportation of a passenger over said road.

According to the express provisions of said charter it could only be amended after thirty years from its passage by a two-thirds vote of both

branches of the legislature, and compensation by the State for all damages sustained by reason of the amendment.

The facts above stated are expressly alleged in the answer and not denied, but stand admitted upon the record.

It is respectfully submitted that such admission is conclusive as to the facts in this case; but should it be held otherwise, then it is insisted that an examination of the statutes, in connection with the averments contained in the answer in relation to the consolidations, will show that the facts are as above stated, and the conclusions well founded.

From the statutes the following appears:

The Charter of the Michigan Southern Railroad Company (App. p. 1) was passed May 9, 1846, and provided (Sec. 2) that that company shall have the right to *contract with* and purchase from *the State* all the right, title and interest of the State in the Southern Railroad, etc., for the sum of $500,000, to be paid by the company as therein provided.

Section 11 (App. p. 7) provided that the company "shall have power to charge for tolls and transportation such sums as shall be lawfully established by the by-laws of said company, not exceeding the rates charged upon said Southern Railroad on the first day of January last." (It is alleged in the answer (p. 10, Record) and not denied, that such rate for transportation was, and ever since has been, three cents per mile.)

Section 15 (App. p. 9) provided that "it shall and may be lawful for the said company, from time to time, to fix, regulate and receive the tolls and charges taken for the transportation of property and persons on said railroad. * * * *Provided*, said company shall charge no greater sum or tolls for the transportation of persons or property than were charged and authorized by the State of Michigan to be taken on the Southern Railroad on the first day of January last."

" * * * and the rights and franchises vested, or which may vest in said company under or by virtue of this act, shall not in any manner be prejudiced or affected save as herein provided, or by judicial proceedings, or by a repurchase of said railroad, to be made by the State in manner aforesaid:" (App. p. 12.)

Section 31 (App. p. 10) provided that the company shall pay a specified tax and "the real and personal property and effects of said company shall, in consideration thereof, be exempt from all and every other tax, charge or exaction by virtue of any laws of this State now or hereafter to be in force, except penalties by this act imposed."

Section 34 (App. p. 10) provided that the State may after 1867 purchase and take from the company said railroad and property upon terms therein stated.

Section 37 (App. p. 13). "The State reserves the right at any time after thirty years from the passage of this act, by a vote of two-thirds of each branch of the legislature, to alter, amend or repeal the same: *Provided*, the said company shall be compensated by the State for all damages sustained by reason of such alteration, amendment or repeal."

In support of my contention upon this point, I beg first to submit the following extract from the brief of Mr. Pond on behalf of the Railway Company, in the court below:

"The provisions of the charter of the Michigan Southern Railroad Company, in relation to rates and fares, are still in force and effect, and apply to the railroad formerly held and owned by that company, and to this respondent who has acquired and succeeded to all the rights, privileges and franchises of that company under said charter.

"It appears by respondent's answer that it owns and operates its line of road in Michigan, which runs through Adrian where relator resides and where the demand was made for the issue of the ticket in question, under a special charter granted by the legislature of Michigan. That such charter ran to the Michigan Southern Railroad Company and was granted in connection with the sale of the said road by the State to said company.

"The provisions of such charter were therefore, as I submit, in the nature of terms of such sale and purchase, *i. e.*, the grant of rights, privileges and franchises made to said company by such charter was not voluntary, but for a consideration paid by such company.

"Now, by the terms of such charter, section 15 (see Session Laws of 1846, p. 184), it is provided as follows, to wit:

"'It shall and may be lawful for said company from time to time to fix, regulate and receive the tolls and charges taken for transportation of property and persons on said railroad as aforesaid. * * * * * Provided said company shall charge no greater sums for the transportation of persons and property than were charged or authorized by the State of Michigan to be taken on the Southern Railroad on the first day of January last.'

"And the only method provided in the act for modifying or taking away the rights, privileges or franchises granted by such a charter is found in a reservation of a right to alter, amend or repeal such charter. Such right is reserved to the legislature by section 37 of the act (see Session Laws of 1846, p. 194) which reads as follows:

"'The State reserves the right at any time after thirty years from the passage of this act, by a vote of two-thirds of each branch of the legislature, to alter, amend or repeal the same. Provided the said company shall be compensated by the State for all damages sustained by reason of such alteration amendment or repeal.'

"Now, the Court will take judicial notice of the fact that the State has never exercised the right so reserved; and hence I submit that if this charter is still in force and the respondent entitled to its benefit, the act in question, which undertakes to fix a rate for the transportation of passengers, is invalid.

"That the charter is still in force I think is beyond reasonable question.

"No attempt has been made to repeal it, and no attempt to alter its terms, except by the act here under consideration, and that act makes no provision for the payment of damages, and, therefore, cannot be held to be an exercise of the power of alteration reserved.

"It will, however, undoubtedly be contended on behalf of the relator that the said Michigan Southern Company, by entering into the consolidations mentioned in respondent's answer, which have resulted in the organization known by respondent's name, surrendered such charter and became organized under the general railroad law of this State.

"But such contention, I submit, cannot be successfully maintained.

"The first consolidation mentioned in the answer was of said Michigan Southern Company with the Northern Indiana Railroad Company, and was entered into by virtue of a special act of the legislature of Michigan.

"This act authorized the consolidated company to be called the Michigan Southern & Northern Indiana Railroad Company, and provided as follows:

"'And all franchises, property, powers and privileges now enjoyed by the Michigan Southern Railroad Company * * * * shall appertain to said new corporation, in the same manner as if the same had been contained in or acquired under an original charter or made by or with the consolidated corporation.' (Session Laws of 1855, p. 301.)

"I submit that it is too clear for argument that by entering into this consolidation under this statute, said Michigan Southern Company did not surrender any of the franchises, property, powers or privileges so conferred upon it by such special charter.

"The next consolidation, so far as the State of Michigan is concerned, it will be contended and may be, for the purpose of this argument, assumed, was under the authority of the so-called General Railroad Law of this State.

"This law, after providing the proceedings to be taken to perfect a consolidation, contains the following provision:

"'And all and singular the rights and franchises of each and all of said two or more corporations, parties to such agreement, and all and singular their rights and interests in and to every species of property and things in action, shall be deemed to be transferred to and vested in such new corporation * * * and such new corporation shall hold and enjoy the same * * * in the same manner and to the same extent as if said two or more corporations * * * should have continued to retain the title and transact the business of such corporations.'

"It will be noticed that the corporations authorized to consolidate under this act were railroad companies within and without the State, whose lines connected in a manner described in this act.

"It is material, therefore, to note in this connection that under said act:

"(1.) Two or more railroad companies organized under such act and whose railroads are wholly within the State, and which companies would have exactly similar rights and franchises, may consolidate.

"(2.) A company organized under such act may consolidate with a company existing under special charter granted by the legislature of said State, and possessing by virtue of such charter franchises, rights and privileges different from and more liberal than those possessed by the former of said corporations.

"(3.) Two or more corporations, existing under special charters from the same State, may consolidate under the authority of a general law, which law is subject to amendment and repeal.

"(4.) A corporation organized and existing under a special charter from the legislature of said State may consolidate with a corporation or corporations existing under the laws of another or other States.

"As to the first of these cases above suggested, it is evident that the corporation consolidating would possess exactly similar franchises, rights and privileges, and that the new organization or corporation produced by the consolidation would have the franchises, rights and privileges, and only the franchises, rights and privileges, granted by such statute to corporations primarily organized under it, and such franchises, rights and privileges would be subject to modification or withdrawal by the exercise by the legislature of the right reserved to it by the constitution to alter, amend or repeal all laws which it may pass for the organization of corporations. And hence the legal principles which would apply to such a consolidation can have no application to the question here under consideration.

"As to the second case suggested, to wit, the consolidation of a corporation organized under the general law, and a corporation existing under special charter granted by the legislature of this State and possessing franchises, rights and privileges more or less liberal than those possessed by the former of said corporations.

"Questions as to the effect of the consolidation of two such corporations have in several instances been before the courts, with the result of decisions which seem to me not quite consistent, but it is unnecessary to attempt to reconcile such cases here. However, in passing, I may call attention to two cases decided by the Supreme Court of the United States.

Tomlinson *vs.* Branch, 82 U. S. (15 Wall.) 460.

"In this case two railroad companies existing under special charters from the State, by the terms of the charter of one of which companies its property was exempt from taxation, and by the terms of the charter of the other its property was not so exempt, were consolidated, and the question arose as to whether by such consolidation the property of the former company had ceased to be so exempt.

"It was held that it had not. Paragraph 3 of the syllabus reads as follows:

"'Where two railroad companies are consolidated the presumption is that each of the two united lines of road will be respectively held with the privileges and burdens originally attaching thereto unless the contrary is expressed.'

Central R. Co. *vs.* Ga., 92 U. S. 665.

"The controversy was as to the effect of a consolidation by two railroad companies existing within and under the laws of the same State under a statute authorizing the same. First paragraph of syllabus reads:

"'The consolidation of two companies does not necessarily work a dissolution of both, and the creation of a new corporation.

"'Whether such be its effect depends upon the legislative intent manifested in the statute under which the consolidation takes place.'

"As to the effect of the consolidation of two corporations existing under special charters from the same State, the question as to whether the result would be a new corporation would depend upon the intention as shown by the statute authorizing such consolidation.

Citizens Street R. Co. *vs.* Memphis, 53 Fed. Rep. 715.

"The fourth case above suggested is the case which we have here, to wit, a Michigan corporation, existing under a charter granting to it rights and privileges different from those granted by the general railroad law to corporations organized under it, and with no power reserved to the legislature to take away any such rights and privileges except upon payment of damages, consolidates, under authority given in that behalf by such general law, with corporations existing under the laws of another or other States.

"Now this being the situation, it seems difficult to understand how such Michigan corporation can be held to

have surrendered such charter and become a corporation organized under such general law and the authorities negative any such result, to wit:

State Treas. *vs.* Aud. Gen'l, 46 Mich. 224.

"This was an application for a mandamus to compel the Auditor General to assess taxes against the respondent company upon the basis of a general railroad law, the theory of the relator being that by consolidating with other companies under the authority of the general railroad law, the Michigan Southern Railroad Company had surrendered its special charter and become formed or organized under such general law, and therefore subject to taxation under it.

"This contention was not sustained. Cooley, J., in the course of the opinion, says: 'Had all the consolidated companies been corporations of this State, possessing like powers, privileges and immunities, and had they proceeded to consolidate under the act of 1873 (the general railroad law), there would have been little or no difficulty in saying that they thereby ceased to exist, and were consolidated into one corporation formed under the provisions of that act.'

"Proceeding with the discussion, Justice Cooley reaches the conclusion that the Lake Shore & Michigan Southern Railway Company is not a corporation formed under the laws of Michigan, but under the laws of Michigan and several other States, and that therefore it is not a corporation formed under said general railroad law.

"He does not, however, in terms determine the question whether or not the Michigan element of that corporation still continues to exist under the special charter granted to it under the name of the Michigan Southern Railroad Company, although such is the result of his reasoning; but in the case which I cite immediately following this he logically settles that question, to wit:

C. & N. W. R. Co. *vs.* Aud. Gen'l, 53 Mich. 79.

"At page 91 he discusses the nature of an organization which was formed by the consolidation of two or more corporations which have received their corporate powers from different sovereignties and upon that subject uses the following language:

"'There may be separate consent (by different sovereignties), given for the consolidation of corporations separately created, and when the two unite they severally bring to the new entity the powers and privileges already possessed, and the consolidated company simply exercises in each jurisdiction the powers the corporation there chartered had possessed, and succeeds there to its privileges.'

R. R. Co. *vs.* R. R. Co., 136 U. S. 356.

"The question involved here was with reference to the effect of consolidation of two corporations existing under the laws of different States, the consolidation having been made by the authority of the statutes of both States.

First paragraph of syllabus:

"'Railroad corporations, created by two or more States, so joined in their interests, in the operation of their roads, in the issue of their stock and in the division of their profits, so as practically to be a single corporation, do not lose their identity, but each has its existence and its standing in the courts of the country only by virtue of the Legislature of the State by which it was created, and the union of names, of officers, of business and of property does not change their distinctive character as separate corporations.'

"In the opinion in the case of C. & N. W. R. Co. *vs.* Aud. Gen'l, 53 Mich. 79, is cited with approval.

"See also the dissenting opinion of Landon, J., in People *vs.* N. Y. C. & St. L. R. Co., 61 Hun, dissenting opinion, pp. 77 to 82. See also reference to such opinion with approval in the same case, 129 N. Y. 474.

"The case was this: The respondent company was a railroad company composed by consolidation of pre-

existing corporations under laws of several different States, including the State of New York. The statute of New York provided that 'every corporation, joint stock company, or association incorporated by or under any general or special law of this State, having capital stock divided into shares, shall pay to the State Treasurer, for the use of the State, a tax of one-eighth of one per cent. on the amount of capital stock the joint stock company or association is authorized to have.'

"This suit was to recover a tax alleged to be due from respondent corporation under such statute.

"It appeared that the New York corporation which entered into such consolidation had paid a tax under this statute based upon the amount of its capital stock, which was greatly less than the capital stock of the consolidated company. The court below held the respondent liable, Judge Landon dissenting.

"Upon review by the Court of Appeals, the judgment below was reversed, Judge Andrews speaking for the court.

He discussed the question involved upon principle and authority, and concludes by referring with approval to the dissenting opinion of Judge Landon.

"Judge Landon, in the course of his opinion, uses the following language:

"'It is also clear, from the authorities, that when a consolidation is effected of corporations of different States, under the enabling statutes of the respective States, no new corporation as an entirety is formed, but each constituent remains in severalty, just as much the creature and creation of its parent State as it was before the consolidation.'

"It is clear, therefore, upon these authorities that the consolidation of the Michigan Southern Railroad Company with the several corporations organized under the laws of other States producing the entity known as the Lake Shore Michigan Southern Railway Company, did

not result in the surrender by the Michigan Southern Railway Company of its then existing charter, and the creation of a new corporation, nor did it result in the surrender by the Michigan Southern Company of its existing charter, and the creation of a new corporation under the general railroad law of the State, and the consolidation of that new corporation with the foreign corporation, but only in the fusion of the interests of the Michigan Southern Company with its existing charter with the other corporations entering into the consolidation.

"It must, I submit, be conceded that it was legally possible for the Legislature of Michigan, at the time of the passage in 1855 of the statutes under which the consolidations, the effect of which is here under consideration, were made, to permit such consolidations without disturbing the status of the Michigan Southern Railroad Company as a corporation existing under its special charter granted in 1846. No case has been or can be found adverse to this proposition. On the contrary, the cases cited show that even when the consolidation of companies existing under the laws of the same State—and hence where the consolidation would result in a new single entity for all purposes and everywhere—the question of whether or not, by such consolidation, the charters of the corporations so consolidating are surrendered and a new charter accepted, is ordinarily a question of legislative intention.

"Now, it is too clear for argument that the legislature by the passage of the act of 1855, authorizing the consolidation of the Michigan Southern Company with the Northern Indiana Company, did not intend that by acting under it, the said Michigan Southern Company should surrender its charter. It could not have so intended; because the result would have been the creation of a corporation by special act, which was forbidden by the constitution.

"The second consolidation was under color of the General Railroad Law, which contained the following provision, to wit:

" 'And all and singular, the rights and privileges of each and all of said two or more corporation, parties to such agreement' (the agreement of consolidation), 'and all and singular, their rights and interests in every species of property and things in action, shall be deemed to be transferred to and vested in such new corporation without any other deed or transfer, and such new corporation shall hold and enjoy the same * * in the same manner and to the same intent as if said two or more corporations, parties to said agreement, had continued to retain the title and transact the business of such corporations.'

"I submit that this provision discloses a clear intention on the part of the legislature that no right or franchise possessed by either of several companies consolidating should lapse or be lost, but that every such right or franchise should vest in the entity produced by such consolidation.

"Now, it is entirely clear that the right of the Michigan Southern Company to charge for the transportation of passengers not to exceed three cents per mile was a right or franchise within the meaning of this provision, and a right or franchise of which it could not be deprived except by amendment of its charter under the power reserved in that behalf by said charter. In fact, or rather in law, the right to damages on account of any alteration of its charter was itself a right and franchise within the meaning of such provision.

"The learned counsel lays stress upon the fact that the legislature characterizes the produced entity as a 'new corporation.' But I submit that this fact can have little, if any, bearing upon the question under consideration.

"In this connection, I call attention to the fact that the legislature in 1883, amended the 1846 charter of the Michigan Southern Company, thus recognizing it as still in existence and applicable to the Lake Shore & Michigan Southern Railway Co. (Session Laws 1883, p. 206.)

"Of course where two or more corporations, existing under the same statute, that is, under exactly similar charters, consolidate, the question of whether, by consoldating, their several charters are surrendered and a new charter accepted, is of no value even speculatively. My discussion has gone upon the assumption of the consolidation of domestic corporations existing under separate and differing charters.

"I insist and submit that a consolidation of two corporations existing under charters from two different States cannot result in a new single corporate entity. If it were so, a dissolution by *quo warranto* or otherwise of such corporation by proceedings in one of the said States, would put an end to its existence everywhere. But clearly this cannot be so. But further discussion of this subject seems unnecessary for the reason that the doctrine for which I am contending is settled by the authorities above cited."

In addition to the foregoing argument and authorities cited by Mr. Pond, I submit the following:

In Tomlinson *vs.* Branch, 82 U. S. 460, it was held that when companies consolidate the presumption is that each of the two united lines of road will be respectively held with the privileges and burdens attaching thereto, unless the contrary is expressed. Bradley, J., said:

"If the old charters allowed ten cents, whilst the new allowed but five, the company would not hesitate, under the grant of the rights and privileges of the old, to continue to charge ten cents, as the former company had done, *and they would have reason on their side.*"

"The owners of the property were to lose no rights by the transfer, nor was the public to lose any rights thereby. Of course these remarks do not apply to those corporate rights and franchises of the old company which appertain to *its existence* and functions as a corporation. These become merged and extinct. *But all its rights* and duties, its privileges and obligations, *as related to the public* or to third persons, remain and devolve upon the new company."

He quotes from P. W. & B. R. Co. *vs.* Maryland, 10 How. 376, and says:

"It considered the evident meaning of the law to be that whatever privileges and advantages either of the former companies possessed should in like manner be held and possessed by the new company to the extent of the road which the said former companies had respectively occupied before the union; that it should stand in their place and *possess the powers, rights and privileges they had severally enjoyed* in the portions of the road which had previously belonged to them."

In County of Greene *vs.* Connors, 109 U. S. 104, it was held:

When two railroads are consolidated it is presumed that the franchises and privileges of each continue in respect to the several roads so consolidated.

In Tennessee *vs.* Whitworth (1885), 117 U. S. 139, L. Ed. B. 833–836, the same doctrine was approved.

In City Council of Charleston *vs.* Branch, 82 U. S. 470 (1872), it was held:

When two railroad companies are consolidated, each of the two united lines will be respectively held with the privileges and burdens originally attached thereto.

In Nash. & L. R. Co. *vs.* B. & L. R. Co., 136 U. S. 356 (34–363), the Court also said:

"There are many decisions, both of the Federal and State Courts, which establish the rule that however closely two corporations of different States may unite their interests, and though even the stockholders of one may become the stockholders of the other, and their

business be conducted by the same directors, *the separate identity of each as a corporation* of the State by which it was created and is a citizen of that State, is not thereby lost."

Citing and quoting from Farnum *vs.* Canal Corp., 1 Sum. 46; Muller *vs.* Dows, 94 U. S. 444 (24–207); St. L., A. & T. H. R. Co. *vs.* F. L. & T. Co., 49 Ill. 331; Quincy R. Br. Co. *vs.* Adams Co., 88 Ill. 619.

In Shields *vs.* Ohio, 95 U. S. 320, the consolidation was of two roads situate wholly in Ohio and incorporated and consolidated solely under Ohio laws.

The Toledo, Norwalk & Cleveland R R. Co. and the Junction R. R. Co., both Ohio corporations, consolidated and formed the Cleveland & Toledo R. R. Co. in 1853. That Company, April 6, 1869, consolidated with the Lake Shore Ry. Co. and formed the Lake Shore Railway Company, and May 27, 1869, the Lake Shore Railway Co. consolidated with the Michigan Southern & Northern Indiana R. Co. and formed the Lake Shore & Michigan Southern Ry. Co.

The T., N. & C. R. Co. and the Junction R. Co., both being Ohio corporations, and the company formed by their consolidation being solely an Ohio corporation, it was held that under the Ohio statute the consolidated corporation was a corporation created by the general railroad law of Ohio and was subject thereto.

In People *vs.* N. Y., C. & St. L. R. Co., 61 Hun, 79, it is said:

"The cases there cited, Shields *vs.* Ohio, and Ry. Co. *vs.* Maine, were cases of the consolidation of domestic corporations."

The Supreme Court of the United States, "when reviewing the final judgment of a State Court upholding a State enactment alleged to be in violation of the contract

In Keokuk & W. R. Co. *vs.* Missouri, 152 U. S. 301, it was held that the right to exemption from taxation of one of the constituent companies, did not pass to the consolidated company, because by the terms of the Act under which the consolidation was effected a new corporation was formed, "making one company of the two," and under the constitution of the State then (in 1869) in force "the legislature had no power to extend to a new corporation created by the consolidation an exemption contained in an act passed in 1857 before the constitution was adopted, and hence that, under the terms of this act, we cannot hold that immunity from taxation passed as a franchise or privilege to the consolidated corporation."

The Court said: "*The new company may doubtless receive by transmission from its constituent companies their property, rights, privileges and franchises, including any immunity from taxation; but it receives them as an heir receives the estate of his ancestor, or as as a grantee receives the estate of his grantor, by inheritance, succession or purchase.*"

In the case at bar there was and is no constitutional prohibition which interfered with or limited the legislative power to permit the transfer to, and continue in, the consolidated company all the rights the Michigan Southern Company acquired and held under its charter and contract with the State, among which was the right to charge and receive fares not exceeding the limit prescribed.

clause of the Constitution, possesses paramount authority to determine for itself the existence or the non-existence of the contract set up, and whether its obligation has been impaired by the State enactment." Chicago, B. & Q. R. Co. *vs.* Nebraska, 170 U. S. 55, 68.

It was within the power of the State to enter into contract with the company, securing to it the right to fix and charge for transportation of passengers rates not exceeding the rates specified, and to limit the exercise by the State of its power to fix and regulate rates by such contract.

In Stone *vs.* Yazoo & Miss. R. R. Co., 62 Miss. 607, the charter of the company, passed in 1882, provided as follows:

"Section 6, * * * That said company shall have and possess the power of fixing, by its board of directors, the rates at which it will do express and telegraph business, and shall transport other express companies as may apply for transportation over its line, at a just and reasonable rate of compensation, and also the rates at which said company will transport persons or property over its railroads and branches; provided, said last mentioned rates shall not exceed four cents per mile for each passenger, nor exceed the following rates of freight * * * but in no case shall the railroad company be limited to a less charge than twenty-five cents for the transportation of any passenger, parcel, package or article, however short the distance. The rates so established from time to time by the said board of directors for transporting persons or property as a railroad company, not exceeding the maximum rates for railroad business as above set out, may be charged and collected by said company." * * *

The road was constructed, and in 1884 an act was passed creating a commission, and authorized it, among other things, to "increase or reduce any of said railroad rates, according as experience and business operations may show to be just."

The company claimed in its suit for an injunction that the act of 1894 was repugnant to the Tenth Section of Article One of the Constitution of the United States, which prohibits laws impairing the obligation of contracts, and to the Fourteenth Amendment.

The Court held that the statute was "unconstitutional and void in so far as it attempts to divert, impair or interfere with the chartered rights of the complainant," and said (p. 641):

"Section 6, of the charter of the appellee, confers on the company power to fix, from time to time, by its board of directors, the rates at which it will transport persons or property over its railroads, provided they shall not exceed a maximum specified in the act.

"The power to contract is an essential attribute of sovereignty, and is of prime importance. Its exercise has been productive of incalculble benefits to society, however great may be the evils incident to its injudicious employment. It cannot be denied merely because of its liability to abuse. *The power to contract implies the power to make a valid contract. Chartering railroad companies and other similar associations has long been an acknowledged and favorite exercise of legislative authority. The right to grant charters includes the right to grant such as will be upheld.* * * *

"A grant in general terms of authority to fix rates is not a renunciation of the right of legislative control so as to secure reasonable rates. Such a grant evinces merely a purpose to confer power to exact compensation which shall be just and reasonable.

"It is only where there is an unmistakable manifestation of a purpose to place the unrestricted right in the corporation to determine rates of compensation that the power of the legislature afterward to interfere can be denied. It is not to be presumed that the right of legislative control was intended to be renounced Every presumption is against that. If the grant can be interpreted without ascribing to the legislature an intent to part with any power, it will be done. Only what is plainly parted with is gone. *Fixing rates in a charter is an exposition of what is reasonable—an exclusion of tacit or implied con-*

ditions on the subject. It is an essential part of the contract of incorporation, the most important condition of its existence, the inducing cause of its acceptance.

"That it was the legislative intent to vest in the appellee the unrestricted right to fix rates within the limits prescribed by the charter is clear; that this was a valid contract by the State and inviolable by it, we regard as settled authoritatively by Federal and State decisions too numerous for citation.

"*If anything is or ever can be settled in American constitutional law, the scanctity and inviolability of a contract between a State and individuals in the shape of a charter for a business enterprise, accepted and acted on by the corporators on the faith of its terms and provisions, must be so regarded.*

"*The appellee has the unquestionable right, from time to time, by its board of directors, to fix the rates at which it will transport over its railroads, provided those rates shall not exceed the maximum prescribed by the charter. That is the contract. These terms were expressly made. On the faith of them capital was invested and the enterprise set on foot. It is not allowable now for one of the contract parties to interfere with the exercise by the other of its plainly granted rights. They are secured beyond the reach of legislation and cannot be impaired.* The State cannot, by an act of its legislature, abdicate the right to govern artificial as well as natural persons, but it may create corporations, and where they are not a part of the machinery of government the franchise cannot be resumed by the legislature or its benefits be essentially impaired without the consent of the grantee. To hold otherwise would be revolutionary and disturb the foundations of society as molded by the judicial utterances of half a century of constitutional government in America."

In Georgia Railroad Co. *vs.* Smith, 128 U. S. 174, the company's charter provided:

"Section 12. The said Georgia Railroad Company shall, at all times, have the exclusive right of transportation or conveyance of persons, merchandise and produce, over the railroad and railroads to be by them constructed, while they see fit to exercise the exclusive right; provided

that the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement, for every one hundred miles; and five cents per mile for every passenger."

The Court held that this section gave an exclusive right of transportation, provided the charges therefor did not exceed the rates specified, and that if it did not exceed those rates, its rights continued exclusive, but that if it charged more, its exclusive right would cease.

The Court, Mr. Justice Field, said:

"It is conceded that a railroad corporation is a private corporation, though its uses are public, *and that a contract embodied in terms in its provisions, or necessarily implied by them, is within the constitutional clause prohibiting legislation impairing the obligation of contracts.* If the charter in this way provides that the charges which the company may make for its services in the transportation of persons and property shall be subject only to its own control up to the limit designated, *exemption from legislative interference within that limit will be maintained.*"

In Reagan case, 154 U. S. 362, the Court, by Brewer, J., said:

"*If the charter had in terms granted to the corporation power to charge and collect a definite sum per mile for the transportation of persons or property, it would not be doubted that the express stipulation formed a part of the obligation of the State which it could not repudiate.*"

In the Munn case, 94 U. S. 113, and the Granger cases, 94 U. S. 155, 164, 179, 180, there was no claim that the State had by charter entered into contract fixing rates. The cases therefore do not present the question here involved. Mr. Chief Justice Waite, however, in his opinion in the case C. B. & Q. R. Co. *vs.* Iowa, 94 U. S. page 155, says:

"This company, in the transaction of its business, has the same rights and is subject to the same control as private individuals under the same circumstances. It must carry when called upon to do so, and can charge only a

reasonable sum for the carriage. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons when controversies arise, what is reasonable. *But when the legislature steps in and prescribes a maximum of charge, it operates upon this corporation the same as it does upon individuals engaged in a similar business. It was within the power of the company to call upon the legislature to fix permanently this limit and make it a part of the charter, and, if it was refused, to abstain from building the road and establishing the contemplated business. If that had been done the charter might have presented a contract against future legislative interference.* But it was not; and the company invested its capital, relying upon the good faith of the people and the wisdom and impartiality of the legislators for protection against wrong under the form of legislative regulation."

And in Peik *vs.* Chicago, etc., Ry. Co., 94 U. S. 164, Chief Justice Waite said:

"In Munn *vs.* Illinois, *supra*, p. 113, and Chicago, Burlington & Quincy Rd. Co. *vs.* Iowa, *supra*, p. 155, we decided that the State may limit the amount of charges by railroad companies for fares and freights, *unless restrained by some contract in the charter*, even though their income may have been pledged as security for the payment of obligations incurred upon the faith of the charter. So far the case is disposed of by those decisions."

The case of Ruggles *vs.* Illinois, 108 U. S. 526, is clearly distinguishable from the case at bar.

In that case the charter provisions relied upon as constituting a contract were as follows:

"Section 5. All the corporate powers of said company shall be vested in and exercised by a board of directors, and such officers and agents as they shall appoint. * * *

"Section 6. The said company shall have power to make, ordain and establish all such by-laws, rules and regulations as may be deemed expedient and necessary to fulfill the purposes and carry into effect the provisions of this act, and for the well-ordering, regulating and securing the affairs, business and interest of the company:

Provided, That the same be not repugnant to the Constitution and Laws of the United States or of this State, or repugnant to this act. The board of directors shall have power to establish such rates of toll for the conveyance of persons or property upon the same, as they shall from time to time by their by-laws determine, and to levy and collect the same for the use of the said company. The transportation of persons and property, the width of track, and all other matters and things respecting the use of said road, shall be in conformity to such rules and regulations as the said board of directors shall from time to time determine."

There is a material difference between the charter provisions in that case and in the case at bar.

In that case no maximum rate was fixed as in the case at bar. Consequently it may well be held that the matter was left subject to legislative control, while in this case a maximum is fixed.

In that case rates could only be fixed *by by-laws* which it was provided should not be repugnant to the laws of the State, and it was held that by-laws which fixed rates above those allowed by the laws of the State were repugnant to such laws.

It is true that sections 11 and 28 of Michigan Southern Company's charter contain provisions in relation to by-laws, but section 15 provides that the company may "from time to time fix, regulate and *receive* the tolls and charges taken for the transportation of property and persons on said railroad" * * * *provided said company shall charge no greater sum than was charged or authorized by the State, Jan.* 1, 1846. There were many matters to be embraced in the by-laws, and the company was permitted to fix rates by by-laws under section 11, but as it evidently was the intention to grant to the company the power to fix rates not exceeding those of January 1, 1846, it was expressly and without limitation or qualification conferred upon the company independently of by-laws. In the Ruggles case stress is laid upon the fact that there was "nothing which even in the remotest degree indicates that a by-law fixing rates is to be of a different character

from those regulating the other business of the company," and therefore it was held that rates fixed by by-laws must conform to the law of the State.

Here, in the case at bar, by section 15, the power is given the company absolutely and unqualifiedly to fix rates not exceeding the maximum named, showing that it was intended that the rate-making power should not be subject to the limitations imposed upon the power to make by-laws.

Here, by section 15, the right and power to fix rates for transportation of passengers is granted subject only to the limitation specified which fixes the maximum.

The power was not, as in Ruggles case, only limited by the laws of the State generally, but by a limit clearly defined and stated, so that the question whether the State could confer the power without limit is not in the case.

In case the grant of power to fix rates is unlimited, as appears by the cases above referred to, the legislature may fix the maximum, but where the maximum is fixed by the charter and contract, its power in that behalf is at an end.

In the Ruggles case the Court said:

"Since, *in the absence of some reasonable contract*, the State may establish a maximum of rates to be charged by railroad companies for the transportation of passengers and property, it follows that when the maximum is so established the rates fixed by the directors must conform to its requirements. Otherwise the by-laws will be repugnant to the general law."

The contention that the act in question is valid because it is within the scope of the police power of the State cannot be sustained.

The police power cannot be successfully invoked to sustain a violation of the requirements and safeguards of the constitution, but it is subordinate thereto.

The public health, the public morals and the public safety are the subjects embraced within the strict and constitutional meaning of the term "police power."

Judge Cooley, in his work on Constitutional Limitations, page 718 (4th ed.), says, in speaking of certain contracts being subject to exercise of the police power:

"Perhaps the most striking illustrations of the principle here stated will be found among the judicial decisions which have held that the rights insured to private corporations by their charters, and the manner of their exercise, are subject to such new regulations as from time to time may be made by the State with a view to the public protection, health and safety, and in order to guard properly the rights of other individuals and corporations. Although these charters are to be regarded as contracts, and the rights assured by them are inviolable, it does not follow that these rights are at once, by force of the charter-contract, removed from the sphere of State regulation, and that the charter implies an undertaking, on the part of the State, that in the same way in which their exercise is permissible at first, and under the regulations then existing, and those only, may the corporators continue to exercise their rights while the artificial existence continues. The obligation of the contract by no means extends so far; but, on the contrary, the rights and privileges of the citizen, are subject in like manner to proper rules for their due regulation, protection and enjoyment.

"*The limit to the exercise of the police power in these cases must be this: The regulations must have reference to the comfort, safety, or welfare of society; they must not be in conflict with any of the provisions of the charter; and they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise.*"

The doctrine of Holden *vs.* Hardy, 169 U. S. 366, does not conflict with but rather sustains my contention. There the Court held that the protection of the health and morals, as well as the lives of citizens, is within the police power of the legislature, but that while the police power "cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety or morals, or the abatement of public nuisances."

In Allgeyer *vs.* Louisiana, 165 U. S. 578–591, it is said:

"In the exercise of such right (the police power) care must be taken not to infringe upon those other rights of the citizen which are protected by the Federal Constitution."

In Chicago, B. & Q. R. Co. *vs.* Nebraska, 170 U. S. 55, 72, it is said:

"Usually, where a contract, not contrary to public policy, has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other; and the obligation of such contract is constitutionally protected from hostile legislation. Where, however, the respective parties are not private persons, dealing with matters and things in which the public has no concern, but are persons or corporations whose rights and powers were created for public purposes by legislative acts, and *where the subject-matter of the contract is one which affects the safety and welfare of the public*, other principles apply. *Contracts of the latter description are held to be within the supervising power and control of the legislature when exercised to protect the public safety, health and morals*, and that clause of the Federal Constitution which protects contracts from legislative action cannot in every case be successfully invoked. The presumption is that when such

contracts are entered into it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the legislature."

Certainly the act in question here does not concern or affect the "safety, health or morals" of the public.

In Pingree *vs.* Michigan Central Railroad Company, 76 N. W. Rep., 635, decided October 3, 1898, a charter similar to that in question here, and passed by the legislature of Michigan in the same year, was under consideration and the Supreme Court of Michigan held that:

"The right to regulate tolls on a railroad may be granted to the company by the legislature so as to render an attempt by a succeeding legislature to fix the tolls an impairment of a contract within the Federal Constitution.

"Laws 1846, Act No. 42, authorized the sale of the Central Railroad, owned by the State, and the incorporation of the Michigan Central Railroad Company in its place. Section 12 provided that the company should have power to regulate the time and manner in which goods and passengers should be transported on said railroad as well as the manner of collecting the tolls. Section 15 provided that the company might fix, regulate and receive the tolls taken for the transportation of property and persons on the railroad, 'subject only' to a limitation as to passengers of 3 cents a mile, and 10 cents in addition on distances not exceeding 30 miles. On the other hand, section 11 provided that the company should have power to charge for tolls and transportation such sums as shall be 'lawfully' established by the by-laws of the company, and section 30 conferred on the board of directors the power to pass all by-laws necessary for the carrying into execution of the powers vested in the company, provided such by-laws should not be contrary to the constitution or laws of the United States, or 'of the State.' *Held*, that the act confers a contract right on the corporation to fix tolls within the limit of three cents per mile,

which right cannot be violated by acts of a succeeding legislature, and that sections 11 and 30 do not qualify the previous sections quoted in so far as they confer such right.

"Pub. Acts 1891, No. 90, reducing the rate per mile on the Michigan Central Railroad to two cents where a 1,000-mile ticket is bought, which does not purport to amend the charter of the railroad, or to make a provision for compensating the railroad for the loss, is not an exercise of the power of amendment reserved in Laws 1846, Act No. 42, § 39, incorporating the road, and reserving the right by a two-thirds vote of the legislature to 'alter, amend, and repeal the charter, provided that the company shall be compensated by the State for all damages" sustained thereby."

The opinion fully sustains all of the propositions here urged by me under the Second Point, except the one relating to the effect of consolidation.

The judgment of the Supreme Court of Michigan should be reversed.

GEO. C. GREENE,
Of Counsel for Plaintiff in Error.

BUFFALO, January, 1899.

APPENDIX.

I.

CHARTER OF THE MICHIGAN SOUTHERN RAILROAD COMPANY.

Passed May 9, 1846.

"An act to authorize the sale of the Southern Railroad and to incorporate the Michigan Southern Railroad Company:

(Act No. 113, Session Laws of 1846.)

"Section 1. Be it enacted by the Senate and House of Representatives of the State of Michigan, That James J. Godfroy, Samuel J. Holley, Harry V. Man, Charles Noble, George W. Strong, Austin E. Wing, Henry Waldron, Stillman Blanchard, Frederick W. Macy, John Burch, Dan B. Miller, Benjamin F. Fifield, William C. Sterling, Wedworth Wadsworth, Edward Bronson, Daniel S. Bacon, Thomas G. Cole, and such other persons as shall associate with them for that purpose, are hereby made and constituted a body corporate and politic, by the name and style of 'The Michigan Southern Railroad Company,' with perpetual succession, and by that name shall be capable in law of taking, purchasing, holding, leasing, selling, and conveying estates and property, whether real, personal, or mixed,

so far as the same may be necessary for the purpose hereinafter mentioned, and no further; and in their corporate name they may sue and be sued; may have a common seal, which they may alter and renew at pleasure, and may have and exercise all powers, rights, privilegs, and immunities which are or may be necessary to carry into effect the purposes and objects of this act, as the same are hereinafter set forth: *Provided*, that nothing in this act contained shall extend or be constructed to authorize the said company to carry on the business of banking, brokerage, or any other business except what properly belongs to a railroad and transportation company, as hereinafter provided.

"Section 2. The said company, within thirty days after the time this act shall take effect and be in force, shall have the right to contract with and purchase from the State, and the State will sell and grant to the said company, all the right, title and interest of the State in and to the Southern Railroad, and all its appurtenances, including the Tecumseh branch, and all rights of way for a railroad between Tecusmeh and Manchester, which the State now has, or is entitled to, and all machine shops and other buildings, and stock and materials upon said road, of whatever name or kind, and all lands or rights of way which the State has or may have acquired in connection with said railroad, for the price or sum of five hundred thousand dollars; of which the sum of ten thousand dollars shall be paid by the said company at the State treasury, to the State Treasurer, within thirty days after the time this act shall take

effect and be in force, and the further sum of forty thousand dollars within three months from the time this act shall take effect and be in force, to be paid as hereinafter provided; and at the time of making said payment of forty thousand dollars, the said company shall execute to the State of Michigan a bond, in the penal sum of one hundred thousand dollars, with sufficient sureties, or securities, to be approved by the Auditor General, conditioned for the payment to the State of all damages it may sustain from the said company's neglecting to return to the State the stock, materials and furniture of said road, of whatever name or kind, in as good condition and of equal value, as when the same was received by said company from the State, in case of any forfeiture of said railroad to the State for any of the causes in the next succeeding section specified; and thereupon the said company shall immediately thereafter be put into and be entitled to the possession of said railroad and its appurtenances, including all lands, machine shops and other buildings (saving and except that any person who may own any building upon the land belonging to the State on the line of the Southern Railroad, which land may be transferred to said company under this act, may dispose of or take away such building within three months after such transfer), and their furniture, and all stocks and materials upon said railroad of whatever name or kind; and said company shall, within six months from the time when this act shall take effect and be in force, purchase and place upon the said road additional locomotives and cars of the value of twenty

thousand dollars. And if said company shall, within nine years from the payment of said sum of forty thousand dollars, pay to the State the further sum of four hundred and fifty thousand dollars in eighteen equal semi-annual installments of twenty-five thousand dollars each, together with the interest upon all portions of the purchase money remaining unpaid, at the rate of six per cent. per annum, to be paid semi-annually, to be computed from the time when the said sum of forty thousand dollars shall have been paid by said company to the State, said sum of four hundred and fifty thousand dollars, and interest thereon, to be paid at the State treasury in the manner prescribed for the payment of the aforesaid sum of forty thousand dollars, then and immediately thereafter, all the right, title and interest of the State to the Southern Railroad and all its appurtenances, including all machine shops, depots and other buildings, and stock upon the said road, of whatever name or kind, and all lands and estates, or interest in land, and rights of way which the State has or may have acquired in connection with said railroad, and for the purposes thereof, and which it may lawfully convey (save as aforesaid), shall then and thereafter vest in and become the property of said company; but such interest in lands shall not extend to or include any lands granted to the State by the government of the United States, for the purposes of internal improvement: *Provided*, that nothing in this section contained shall be construed as rendering the State liable by reason of any want of power to convey or for

any defect or failure of the title in and to the property granted, or any part thereof.

"Section 3. In case said company shall not within thirty days after the time this act shall take effect and be in force pay into the State treasury the sum of ten thousand dollars, and within three months from the time this act shall take effect and be in force, the further sum of forty thousand dollars, in manner provided in the last preceding section, then in such case, said Michigan Southern Railroad Company hereby incorporated, shall immediately be and become dissolved, and shall thenceforward neither have nor exercise any of the rights, privileges, or immunities of a body corporate or politic for any purpose whatsoever; and in case the said company shall pay into the State treasury in manner aforesaid, the sum of ten thousand dollars within thirty days after the time this act shall take effect and be in force, and within three months after the time this act shall take effect and be in force, the further sum of forty thousand dollars, but shall fail to pay into the State treasury in the manner and within the times above specified, after such payment of the said sum of forty thousand dollars, the further sum of four hundred and fifty thousand dollars, with interest on the same semi-annually, at the rate of six per cent. per annum, to be computed as aforesaid, or shall fail to pay any part thereof when due and payable, then in such case the said sum of ten thousand dollars, and the said sum of forty thousand dollars, and all other sums that may have been paid prior to such default, shall be and become absolutely

forfeited to the State; and all property and estate of whatever name or kind, which said company shall be seized or possessed of or entitled to, shall immediately become forfeited to and vest in the State to all intents and purposes; and the State may immediately thereafter take possession of the same, and all corporate franchises hereby granted shall then and thereafter become and be wholly null and revoked;

* * * * *

"Section 5. The said Michigan Southern Railroad Company shall have full power and authority to locate, and from time to time to alter, change, and relocate, so as not to materially change the route, construct and reconstruct, and fully to finish, perfect and maintain a railroad, with one or more tracks, from some suitable point at or near the mouth of the ship canal, in the city of Monroe, to pass through the villages or towns of Petersburg, Adrian, Hillsdale, and thence to Coldwater, by the way of Jonesville, if deemed the most practicable route, and from thence to Lake Michigan, on the line heretofore established as the line of the Southern Railroad by the State, or anywhere further southward than said line, and also from the junction of the Tecumseh branch with the said Southern Railroad, to pass through the villages of Tecumseh and Clinton, to the village of Manchester, in the county of Washtenaw, in this State, and to transport, take and carry property and persons upon said railroad or way, by power and force of steam, or of animals, or of any mechanical or other powers, or any combination of them which said company may choose to use or apply.* * *

"And no railroad or railroads, from the eastern or southern boundary of the State shall hereafter be authorized to be built or constructed by or under any law of this State, any portion of which shall approach westwardly of the township of Monroe, in the county of Monroe, within five miles of the line of said railroad, as designated in this act; nor shall any railroad or railroads be so authorized to be built or constructed which shall commence within twenty miles of the city of Monroe, and extend to Lake Michigan, or the southern boundary line of the State, and the line of which shall, on an average, run within twenty miles of the main line of the said Michigan Southern Railroad: *Provided*, that this section shall not be construed to restrict or prevent the construction of public roads or canals, or private ways, under, above or across the road of said company, when deemed expedient, but so as not necessarily to obstruct the same.

* * * * *

"Section 11. The said company shall have power to purchase with the funds of the company, or contract for and place on any railroad constructed by them under this act, all machines, wagons, carriages, or vehicles of any description which they may deem necessary and proper for the purposes of transportation on said railroad, and they shall have power to charge for tolls and transportation such sums as shall be lwfully established by the by-laws of said company, not exceeding the rates charged upon said Southern Railroad on the first day of January last; and it shall not be lawful for any

other company, or any other person or persons, to transport any passengers or merchandise, or property of any description whatever, upon said railroad or any part of it, without the license or permission of said company; and the said railroad, with all its improvements, works and profits, and all machinery used on said railroad, for transportation, and all the machine shops, depots, buildings and edifices connected with said railroad shall be vested in the said company forever; and the shares of the capital stock of said company shall be considered personal property, and shall be transferable on the books of said company, agreeably to the by-laws of said company, and subject to be taken in execution agreeably to such laws as are or may hereafter be in force.

"Section 12. The said company shall have full power and authority to demand and recover and take the tolls or dues to and for their own proper use and benefit on all goods, merchandise and passengers using or occupying the said railroad, or any other convenience, erection or improvement built, occupied or owned by the said company, to be used therewith, and shall have power to regulate the time and manner in which goods and passengers shall be transported, taken and carried on the same, as well as the manner of collecting all tolls and dues on account of transportation and carriage, and storage, and shall have full power to erect and maintain such toll-houses and other buildings for the accommodation and proper transaction of their business as to them may seem necessary: *Provided*, that at the eastern termination of said railroad no greater or

higher charges shall be allowed or charged for the storage or shipment of property than shall be charged or allowed for like service by the Michigan Central Railroad Company at the eastern termination of the Michigan Central Railroad.

* * * * *

"Section 15. It shall and may be lawful for the said company from time to time to fix, regulate and receive the tolls and charges taken for the transportation of property and persons on said railroad as aforesaid, hereby authorized to be constructed, erected, built, made and used, and for storage of property remaining in the depot of said campany, if not taken away as hereinafter provided: *Provided*, said company shall charge no greater sum or tolls for the transportation of persons or property than were charged or authorized by the State of Michigan to be taken on the Southern Railroad, on the first day of January last; and said company shall transport merchandise and property on the said road without showing partiality or favor, and with all practicable dispatch, under a penalty for each violation hereof of one hundred dollars, to be recovered by the party aggrieved in an action of debt: *Provided*, *nevertheless*, that soldiers, sailors and marines, and their officers, in the service of this State or of the United States, and officers of the army and navy of the United States, and arms, ordinance, military stores and munitions of war, shall, upon request made by the proper authority, take priority and precedence, first in favor of this State, and secondly in favor of the United States, and shall be transported

upon said railroad before and in exclusion of all other persons and property.

* * * * *

"Section 31. The said company shall pay to the State an annual tax of one-half of one per cent. upon the capital stock paid in, including the five hundred thousand dollars of purchase money paid, or to be paid to the State, until the first day of February, eighteen hundred and fifty-one, and thereafter an annual tax of three-fourths of one per cent. upon its capital stock paid in, including the five hundred thousand dollars of purchase money aforesaid, and also upon all loans made to said company, for the purpose of constructing said railroad, or purchasing, constructing, chartering or hiring of steamboats authorized by this act to be held by said company, which tax shall be paid in the last week of January in each year to the State Treasurer, and the property and effects of said company, whether real, personal or mixed, shall, in consideration thereof, be exempt from all and every other tax, charge and exaction by virtue of any laws of this State, now or hereafter to be in force, except penalties by this act imposed.

* * * * *

"Section 34. The State may, at any time after the first day of January, eighteen hundred and sixty-seven, purchase and take from said company, said railroad, and all the property, effects and assets of said company, and said railroad and appurtenances thereof; and all the estate, property, effects and assets of said company (subject to all existing mortgages and other liens thereon, on account of loans, he

proceeds of which shall have been invested in the said road or other works of said company), shall fully and forever vest and become the estate, property and effects of the State, to all intents and purposes, so soon and whenever after the day aforesaid, the State shall pay or cause to be paid to said company the value of the entire stock of, and shares in said company, at the market value of said stock or shares, and ten per cent. in addition to such market value of said stock or shares; such market value to be ascertained by taking the average of the public sale prices of said stock or shares, as made in the city of Boston, in Massachusetts, and in the City of New York, in the State of New York, during the twelve months next preceding the first day of January, in the year in which the State shall so purchase; but in no case shall the amount to be paid be less than the amount of capital actually paid in by the stockholders of said company; and in case the State and said company cannot agree upon the said market value of said stock or shares, the Supreme Court of this State shall be competent to determine the same, upon application thereof, to be made to said Court within six months after the State shall elect to purchase; and the moneys so to be paid to said company shall be payable at the State treasury of the State of Michigan, in lawful current money of the United States, within two years after the time when the State shall elect to purchase, and the amount to be paid shall have been determined, as herein provided, upon three months' previous notice of the time of such payment, to be published weekly in one or more newspapers

published in the city of Detroit, or at the capitol of the State of Michigan, and thereupon the corporate powers and franchises of said company shall wholly cease, and the rights and franchises vested, or which may vest in said company under or by virtue of this act, shall not in any manner be prejudiced or affected save as herein provided, or by judicial proceedings, or by a repurchase of said railroad; to be made by the State in manner aforesaid: *Provided*, that whenever in this act provision is made for a penalty to accrue, for the doing or not doing any act, said company shall in no wise be prejudiced by the doing or not doing of such act, except by the enforcement of such penalty.

"Section 35. All lands and property, and rights and interests therein, acquired by said company, by purchase or otherwise, in case of the repurchase of the railroad of said company by the State, shall become vested in the State in as full and ample a manner as the same were vested in, or exercised or enjoyed by the said company; and all deeds and conveyances, gifts and grants of real and personal property to said company, and all inquisitions taken or had under this act, to which said company shall be a party, shall, in case of repurchase, accrue to the State in the same and as full and ample a manner as if the State had been the party to such deeds, conveyances, gifts, grants and inquisitions, instead of said company; and the State shall have full right and authority to have and use the same, and sell, assign and transfer the same to any person or persons whatever. * * * *

"Section 37. The State reserves the right at any time after thirty years from the passage of this act, by a vote of two-thirds of each branch of the legislature, to alter, amend or repeal the same; *Provided*, the said company shall be compensated by the State for all damages sustained by reason of such alteration, amendment or repeal."

II.

AN ACT TO AUTHORIZE THE MICHIGAN SOUTHERN RAILROAD COMPANY TO CONSOLIDATE WITH THE NORTHERN INDIANA RAILROAD COMPANY.

(Act No. 138, Session Laws of 1855)

"Section 1. *The People of the State of Michigan enact*, That the Michigan Southern Railroad is hereby authorized to consolidate with the Northern Indiana Railroad Company, of Indiana, by a vote of a majority in interest of the stockholders of each of said corporations, at meetings called for that purpose, or by the written assent of such majority, to be filed in the office of the Secretary of State; and when said vote shall be passed, and such assent filed, and an agreement entered into, as provided in section two, said corporations shall thereby be united and become one corporation, to be called the Michigan Southern and Northern Indiana Railroad Company; and all the franchises, properties, powers and privileges, now enjoyed by the Michigan Southern Railroad Company, and all the restrictions, liabilities and obligations imposed upon said two corporations, by virtue of their respective charters, and all contracts by and with either or both of said corporations, shall appertain to said united corporation, in the same manner as if the same had been contained

in or acquired under an original charter, or made by or with said consolidated corporation, and in the same manner as if such consolidation had not taken place; and all debts and demands against said Michigan Southern Railroad Company, shall be enforced against said new corporation, to the same extent and in the same manner as if such debts or demands had been originally incurred by it; and all obligations of said Michigan Southern Railroad Company, under the act entitled 'An act to authorize the sale of the Southern Railroad, and to incorporate the Michigan Southern Railroad Company,' and of the directors thereof, shall be transferred to said new corporation, and the directors thereof, and said new company shall cause its books to be opened, for the purpose of receiving subscriptions to its capital stock for the purpose of extending said road, in the same manner and upon the same terms as the Southern Michigan Railroad Company would have been required to do if such consolidation had not been made; and any person or persons may subscribe stock for the extension of either of the roads named in said section, in the same manner and upon the same terms as if no consolidation had taken place; and the directors of said new company shall cause the said road to be constructed in the same manner and upon the same conditions as said Michigan Southern Railroad Company would have been compelled to do, were it not for such consolidation; and the shares on the road so extended shall be entitled to a dividend of the net profits of said road, in proportion to the amount of installments paid in on the respective

shares of said company; and the persons so subscribing and paying shall be stockholders in said new company, and entitled to all rights and privileges of the original stockholders of said new company, in the same manner and to the same extent as is contemplated by the original charter of the said Michigan Southern Railroad Company.

"Section 2. The directors of said corporations may enter into an agreement, under their respective corporate seals, for the consolidation of said corporations, prescribing the terms and conditions thereof; the mode of carrying the same into effect; the number of directors thereof, which shall not be less than seven nor more than thirteen; the names of the first directors of said united corporation; the time and place of holding the first election of directors; the day for holding the annual election of directors; the amount of capital and the number of shares of the stock of the new corporation, which shall not be larger in amount than the aggregate amount of capital authorized by the charters of the respective companies thus consolidated; the manner of converting the shares of capital stock in each of said corporations into the shares of such new corporation, with such other details as they may deem necessary to embrace in such agreement, not inconsistent with the provisions of their respective charters.

"Section 3. The said corporation so to be organized, by virtue of this act, shall continue subject to the same rate of tax as though such consolidation should not take place; and the amountt of its capital and loans hereafter, upon which such taxation shall

be paid, shall be such portion of the whole of its capital and loans as is actually employed in the State of Michigan, to be ascertained on or before the first day of January in each year, by the Auditor General of this State, from the annual report of said corporation, or from such other reports on oath as he may deem necessary for such purpose, to be ordered by him from the office of such corporation.

"Section 4. The said new company shall erect and maintain fences on the sides of their road, of the height and strength of a division fence, required by law, with suitable openings and gates thereon, and convenient farm crossings of the road for the use of proprietor of land adjoining said railroad, and also to construct and maintain cattle guards at all public road crossings, except in cities and villages, suitable and sufficient to prevent cattle and animals from getting on to the railroad; until such fences and cattle guards shall be duly made, such railroad company and its agents shall be liable for all damages which shall be done by their agents or engines to cattle, horses or other animals thereon, and for all other damages consequent upon their refusal or neglect to maintain fences as aforesaid; and after such fences and guards shall be duly made and maintained, said company shall not be liable for any such damages, unless negligently or willfully done; and if any person shall ride, lead or drive any horse or animals on such road, and within such fences or guards, other than road crossings, without the consent of such company, he shall, for every such offense, forfeit a sum not exceedng ten dollars, and shall pay all

damages which shall be sustained thereby to the party aggrieved.

"Section 5. The said new corporation, so to be formed by such consolidation, shall at all times carry freight and persons to and from all its depots, way-stations, and other places where it is accustomed to receive or deliver such freight or persons, with all practicable dispatch, without any favoritism or partiality whatsoever, (and as near as may be) shall forward from each of such depots, way-stations or places, in the order it is received thereat respectively, when desired by the owner thereof, all freight delivered to it for transportation; and in case of any neglect in either of the particulars before mentioned, said company shall be liable for all damages occasioned thereby to the owner of the property so delivered for transportation, in any form of action such owner may select; and said company shall in no case give any precedence or preference whatsoever in the time of transportation to through freight over way freight; and in case any such preference or precedence is given, said company shall be liable to a like action and damage therefor; and it shall also be liable to a like action and damages for all delays in the transportation of property, unless such delay shall be caused without any default, neglect or wrongful act whatsoever, on the part of such corporation or its agents or employes; and when an action for damages is given in this section, the party injured may sue for, and said company shall be liable for a penalty of one hundred dollars, instead of such action, at the election of the party owning any such property.

"Section 6. This act shall take effect whenever the said companies shall accept the same; and their acceptance in writing, signed by the president and secretary of said companies, under their corporate seals, shall be filed in the office of the Secretary of State.

"Approved February 13, 1855."

III.

GENERAL RAILROAD LAW OF MICHIGAN AS IT STOOD IN 1869 WHEN THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY CONSOLIDATION WAS EFFECTED.

From Chapter LXXV, Compiled Laws Michigan, 1871, Vol. 1, Page 744.

"*An Act to provide for the incoporation of railroad companies:*

(Approved February 12, 1855, Laws 1855, p. 153.)

"Section 1. *The People of the State of Michigan enact*,, That any number of persons, not less than twenty-five, being subscribers to the stock of any contemplated railroad, railroad bridge, or railroad tunnel, may be formed into a corporation for the purpose of constructing, operating, and maintaining such railroad, railroad bridge, or railroad tunnel, over or under any of the waters of this State, by complying with the following requirements: When stock to the amount of one thousand dollars for every mile of said road so intended to be built, or to the extent of one-half of the estimated cost of any such bridge or tunnel so intended to be built, shall be in good faith subscribed, and five per cent. paid thereon, as herein

required, then such subscribers may select directors for said company; and thereupon, they shall severally subscribe articles of association, in which shall be set forth the name of the corporation; the number of years the same is to be continued, the amount of the capital stock of the company, which shall not be less than eight thousand dollars per mile of road constructed or proposed to be constructed of the 'T' or continuous rail, and not less than four thousand dollars per mile of road constructed or proposed to be constructed with the flat-bar rail, and not less than half the estimated cost of any such bridge or tunnel: *Provided*, That no car shall be run at a higher rate of speed than fifteen miles per hour upon any road so constructed with the flat-bar rail; the number of shares of which the stock shall consist; the number of directors and their names, who shall not exceed in number one-half the stockholders; the place from and to which the proposed road is to be constructed, and each county into or through which it is intended to pass, and its length, as near as may be, and the name of five commissioners to open books of subscription to the stock; and in the case of such bridge or tunnel, the locality in which it is intended to construct the same. Each subscriber to such articles of association shall subscribe thereto his name, place of residence, and the number of shares of stock taken by him in such company. The articles of association may be filed in the office of the Secretary of State: *Provided*, That such articles of association shall not be filed in the office of the Secretary of State, as aforesaid, until five per cent. of the amount of stock

subscribed thereto shall have been actually paid in cash to the directors named in such articles, nor until there is annexed thereto an affidavit made by at least one-half of the directors named in said articles, that the amount of stock required by this section, to-wit: One thousand dollars per mile for any such railroad, or one-half of the estimated cost of any such railroad bridge or tunnel, has been subscribed, and that five per cent. of the amount has been actually paid in; and thereupon, the persons who have subscribed, and all persons who shall from time to time become stockholders in such company, shall be a body corporate, by the name specified in such articles, and shall be capable of sueing and being sued, and may have a common seal, and may make and alter the same at pleasure, and be capable in law of purchasing, holding and conveying any real and personal property whatever, necessary for the construction of such road, bridge, or tunnel, and for the erection of all necessary buildings, yards, and appurtenances for the use of the same, and shall have power, annually thereafter, or at such other times as the stockholders owning not less than one-fourth of the stock shall determine, and in the same manner as provided in section nineteen hundred and fifty of the Compiled Laws, to call a meeting of the stockholders, and thereat to choose not less than seven nor more than thirteen directors, who shall be members of said body corporate; and all the provisions of section four of this act shall apply to the election of such directors; and any railroad bridge or railroad tunnel company shall, for all the purposes of this act, be deemed and taken

to be a railroad company, and shall be entitled to all the benefits of all the provisions of this act, and subject to all its restrictions: *And provided further*, That any railroad bridge company or railroad tunnel company, which may be organized under this act to bridge or tunnel the Detroit river or the St. Clair, or any of the waters in the jurisdiction of this State, shall have the right to consolidate the stock, property, and assets of said company, with the stock, property, and assets of any company organized or to be organized under the laws of this State, or which may be created under the laws of any adjacent State or country, to construct any such bridge or tunnel to connect therewith, upon such terms, conditions, and agreements as may by the said two companies be deemed just and equitable: *Provided*, That every such bridge or tunnel shall be so constructed as not to be a material obstruction to navigation.

* * * * *

"Section 17. Every such corporation shall possess the general powers, and be subject to the liabilities and restrictions following, that is to say,— * * * * *

Ninth. To regulate the time and manner in which passengers and property shall be transported and the tolls and compensation to be paid therefor; but such compensation for transporting any passenger, and his or her ordinary baggage, shall not exceed the following prices, viz.: On roads over twenty-five miles in length, three cents per mile; on roads not over twenty-five miles in length, four cents per mile; on roads not over twenty-five miles

in length, for any distance under six miles, twenty-five cents, unless by special act of the Legislature, and shall be subject to alteration as hereinafter provided: *Provided*, That the rate of freight charged and collected by the officers and agents of such railroad for any shorter distance, shall never exceed that charged and collected for the same class of goods over a longer distance upon the said road; nor shall the rates of freight charged and collected by the officers or agents of said road between any intermediate stations upon said road, at any time exceed by more than twenty-five per cent. the pro rata charge per mile for the same character of freight over longer distances upon the said road, or for the entire distance and length of said railroad.

* * * * *

"Section 45. Every corporation formed under the provisions of this act shall, on or before the first day of July, in the year one thousand eight hundred and sixty-nine, and annually thereafter on or before the first day of October of each year, pay to the State Treasurer, on the statement of the Auditor General, an annual tax of one per cent. on the capital stock of said company paid in, and also upon all sums of money, whether arising from the net proceeds of said road, from municipal aid, from the sale of lands, or from other sources, as shall from time to time be invested in the original construction and stocking, or in any new construction or stocking of said road, which tax shall be in lieu of all other taxes upon the property of said company, whether real, personal, or mixed, except penalties by law imposed; and such

tax shall be estimated upon the last annual report of said corporation filed in the office of the Auditor General, as required by section thirty-two of this act; but nothing contained in this section shall apply to any corporation existing at the time of the approval of the act of which this is amendatory, nor to alter, reduce, or in any way affect the tax of any corpration not formed under the provisions of said act: *Provided*, That no corporation formed under the provisions of the act to which this is amendatory shall be liable to pay any tax on any money expended on any portion of its road, which has not been opened for use.

* * * * *

"Section 50. Any railroad company in this State, forming a continuous or connected line with any other railroad company, may consolidate with such other company, either in or out of this State, into a single corporation: *Provided*, That no such companies owning parallel or competing lines shall be permitted to consolidate themselves into one corporation. The directors of said two or more corporations may enter into an agreement, under the corporate seal of each, for the consolidation of the said two or more corporations, prescribing the terms and conditions thereof; the mode of carrying the same into effect; the name of the new corporation; the number of the directors thereof, and the names of those who shall be the first directors, which shall be deemed and taken to be the first election of the directors of the consolidated company, which number shall not be less than seven nor more than thirteen; the time and

place of holding the first election of directors after such consolidation, which time shall not exceed six months after such consolidation has been sanctioned by the stockholders of said two or more corporations as hereinafter provided; the number of shares of capital stock in the new corporation; the amount of each share; the manner of converting the shares of capital stock in each of said two or more corporations into shares in such new corporation, with such other details as they shall deem necessary to perfect such consolidation of said corporations. And such new corporation shall possess all the powers, rights, and franchises conferred upon such two or more corporations, and shall be subject to all the restrictions, and perform all the duties imposed by the provisions of their respective charters or laws of organization, not inconsistant with the provisions of this act. Such agreement of the directors shall not be deemed to be the agreement of the said two or more corporations until after it has been submitted to the stockholders of each of said corporations, separately at a meeting thereof, to be called upon a notice by publication at least once in each week for four successive weeks, in one of the daily papers published in the City of Detroit, and some newspaper published in each county in this State through which said roads run, in which newspaper shall be published the first publication to be at least sixty days before the time specified for said meeting, and signed by the secretaries of each of the said companies proposing to consolidate, stating the purpose and object of said meeting, and has been sanctioned by such stockhold-

ers by a vote of a majority in interest of the stockholders, in person or by proxy, each share of capital stock being entitled to one vote; and when such agreement of the directors has been so sanctioned by each of the meetings of the stockholders, separately, after being submitted to such meetings in the manner above mentioned, then such agreement of the directors shall be deemed to be the agreement of the said two or more corporations. A copy of said contract or consolidation agreement, filed in pursuance of this act with the Secretary of State, and certified by him to be a copy, shall in all Courts and places be presumptive evidence of the consolidation of said two or more companies, and of all the facts therein stated.

"Section 51. Upon making the agreement mentioned in the preceding section, in the manner required therein, and filing a duplicate or counterpart thereof in the office of the Secretary of State, the said two or more corporations mentioned or referred to in the said section shall be merged in the new corporation provided for in such agreement, to be known by the corporate name therein mentioned, and the details of such agreement shall be carried into effect as provided therein.

"Section 52. Upon the election of the first board of directors of the corporation created by said agreement, all and singular the rights and franchises of each and all of said two or more corporations, parties to such agreement, all and singular their rights and interest in and to every species of property and things in action, shall be deemed to be transferred to

and vested in such new corporation, without any other deed or transfer; and such new corporation shall hold and enjoy the same, together with all the right of way, and all other rights of property, in the same manner and to the same intent as if the said two or more corporations, parties to such agreement, should have continued to retain the title and transact the business of such corporations; and the titles and the real estate acquired by either of said two or more corporations shall not be deemed to revert or be impaired by means of anything in this act contained: *Provided*, That all rights of creditors, and all liens upon the property of either of said corporations, parties to said agreement, shall be and hereby are preserved unimpaired, and the respective corporations shall continue to exist, so far as may be necessary to enforce the same: *And provided further*, That all the debts, liabilities, and duties of either company shall thenceforth attach to such new corporation, and be enforced against the same, to the same extent and in the same manner as if such debts, liabilities, and duties had been originally incurred by it."

IV.

STATUTE PASSED IN 1883 RECOGNIZING EXISTENCE OF THE MICHIGAN SOUTHERN RAILROAD COMPANY AND AMENDING ITS CHARTER.

"An Act to amend section five of an act entitled 'An Act to authorize the sale of the Southern Railroad, and to incorporate the Michigan Southern Railroad Company,' approved May nine, eighteen hundred and forty-six.

(Act No. 189, Session Laws of 1883.)

"Section 1. *The People of the State of Michigan enact*, That section five of an act entitled 'An act to authorize the sale of the Southern Railroad, and to incorporate the Michigan Southern Railroad Company,' approved May ninth, eighteen hundred and forty-six, be amended so as to read as follows: The said Michigan Southern Railroad Company shall have full power and authority to locate, and from time to time to alter, change and relocate, so as to not (so as not to) materially change the route, construct, and reconstruct, and fully to finish, perfect, and maintain a railroad with one or more tracks, from some suitable point, at or near the mouth of the ship canal in the city of Monroe, to pass through the villages or towns of Petersburg, Adrian, Hillsdale, and thence to Coldwater by the way of Jonesville, if

deemed the most practicable route, and from thence to Lake Michigan, on the line heretofore established as the line of the Southern Railroad by the State, or anywhere further southward than said line, and also from the junction of the Tecumseh branch with the said Southern Railroad, to pass through the villages of Tecumseh and Clinton to the village of Manchester in the county of Washtenaw, in this State, and to transport, take, and carry property and persons upon said railroad or way, by power and force of steam, or of animals, or of any mechanical, or other powers, or any combination of them which said company may choose to use or apply. And for the purpose of constructing said railroad or way, said company shall have authority and power to lay out, designate, and establish their road in width not exceeding one hundred and fifty feet, through the entire line thereof, and may take, have and appropriate to their use all such lands so designated for the line or construction of said road, upon first paying or tendering therefor, or depositing with the treasurer of the State, subject to the order of the Court which may confirm the inquisition of the jury, such amount of damages as shall have been settled by appraisal, in the manner hereinafter provided, on all such lands as may be taken westwardly from the village of Hillsdale, or northwardly to (of) Tecumseh on the Tecusmeh branch, or upon any new track that may be located by said company, and for the purpose of cuttings, and embankments, and for the obtaining of stone, sand, and gravel, may take and appropriate as much more of land as may be necessary for the

proper construction and security of said road; and for constructing shops, depots, and other proper, suitable, and convenient fixtures in connection with and as appurtenances to said railroad, may take, have, use and occupy any lands on either side of said railroad not exceeding two hundred feet in depth from said railroad, the said company taking all such lands as gifts, or purchasing, or making satisfaction for the same in manner hereinafter provided. This section shall not be construed to restrict or prevent the construction of public roads, or canals, or private ways, under, above, or across the road of said company, when deemed expedient, but so as not unnecessarily to obstruct the same.

"Ordered to take immediate effect.

"Approved June 8, 1883."

V.

GENERAL RAILROAD LAW OF 1873, AND AMENDMENTS TO 1891.

In 1873, the general railroad law of 1855 was repealed, and a new general railroad law was passed.

It appears as Act No. 198, in the Session Laws of 1873.

It provided for organization of railroad companies, and contained many details which cannot be important here.

The material provisions, with amendemnts down to and including the Act of 1891, in question here, are as follows:

"An Act to revise the laws providing for the incorporation of railroad companies, and to regulate the running and management, and to fix the duties and liabilities of all railroad and other corporations owning or operating any railroad in this State.

(Act No. 198, Session Laws of 1873.)

ARTICLE I.

ORGANIZATION.

"Section 1. *The People of the State of Michigan enact*, That it shall be lawful for any number of persons, not less than seven, to organize themselves in-

to a corporation for the purpose of constructing, operating and maintaining a railroad, railroad bridge, or railroad tunnel; and for such purpose such persons shall subscribe articles of association, in which shall be set forth the name of the corporation, the number of years the same is to be continued, the amount of capital stock of said company, which shall not be less than four thousand dollars per mile of road constructed, or proposed to be constructed, with flat-bar rail, or with a gauge not exceeding three feet six inches in width, and not less than eight thousand dollars per mile of road constructed, or proposed to be constructed, of 'T' rails with gauge exceeding three and one-half feet in width, and not less than one-half the estimated cost of any such bridge or tunnel; the number of shares of which the stock shall consist, which shall be the amount of one hundred dollars each; the number of directors, which shall not be less than five nor more than fifteen, and their names; the places from and to which, and the name of each county into or through which it is or is intended to be constructed, and its length as near as may be." * * * *

In 1891 Section 3 was added to Article I, and is as follows:

(Act No. 52, approved May 1, 1891.)

"Section 3. Any railroad company incorporated by special charter heretofore granted by the legislature of this State, may surrender such charter and incorporate under this act. Such surrender and incorporation may be effected by the passage of a resolution in that behalf by a vote of two-thirds in interest

of the holders of the stock of such company, at a meeting called and held for that purpose, as hereinafter provided, and filing in the office of the Secretary of State a certificate signed by the president and secretary of said company, and under its corporate seal, containing: (1) A recital of such resolution, so passed by such stockholders; (2) A declaration of such surrender and incorporation; (3) The name by which such new corporation is to be known, which may be the same as the name of such former corporation; (4) The time of existence of such new corporation; (5) The amount of its capital stock, which shall be represented by shares of one hundred dollars each; (6) The total number of shares to be issued to the stockholders of such former company, which shall not exceed the total amount of stock of said corporation then held by said stockholders; (7) The number of directors of such new corporation, which shall not be less than five nor more than fifteen, and the names of the persons selected to act as such directors until the first annual meeting of said new corporation. Upon filing such declaration, such surrender and incorporation shall be deemed to be duly and completely effected; and thereupon all and singular all the railroad and other property, and all rights and interests therein, and all contracts and rights of action theretofore owned or possessed by said corporation so surrendering its charter, shall be deemed to be transferred to and vested in such new corporation, as owner thereof, by like title as the same were theretofore held and possessed by said former corporation; and such new corporation shall

thereafter hold, possess and enjoy the same in like manner and to the same extent as said corporation so surrendering its charter might and could have done if such surrender had not been made: *Provided, however*, That the property so transferred to and vested in such new corporation shall continue subject to all liens existing thereon at the time of such transfer, and such new corporation shall be subject to all debts and liabilities of said corporation so surrendering its charter; and such debts and liabilities may be enforced against such new corporation to the same extent and in like manner as if the same had been originally incurred by it. A duly certified copy of such declaration, so filed in the office of Secretary of State, shall be *prma facie* evidence of the due incorporation of the company named therein. The meeting of the stockholders of any such company, at which the resolution hereby required shall be passed, shall be called by the Board of Directors of such company, by a resolution passed by a majority of said board, at a meeting duly called and held in accordance with the by-laws of said company, and notice of the time when and the place where said stockholders' meeting is to be held, and the purpose thereof, shall be published at least once a week for twelve successive weeks immediately prior to the date of said meeting, in a newspaper of general daily circulation, published in the cities of Detroit, New York, and Chicago, respectively, and also in a news paper published in the city or township where the general office of said company is situated, if not situated in the city of Detroit.

"Approved May 1, 1891."

ARTICLE II.

CORPORATE POWERS AND DUTIES OF DIRECTORS.

"Section 1. All of the corporate powers of any such corporation shall be and are hereby vested in the board of directors, except as may be herein otherwise provided. No person except a stockholder shall be a director of said corporation, and no stockholder shall be entitled to vote for directors, or for any other purpose, who shall be in arrears in the payment of any assessment made on his subscription to stock. The president of said corporation shall be elected by the directors from their own number. * * *

"Section 2. It shall be lawful for any company organized under this act, or under any former act for the incorporation of railroads, upon a vote of its stockholders holding two-thirds of its subscribed stock, at any meeting thereof, to alter and amend its articles of association so as to change the general route of said railway, or to extend the length of the line thereof, from either or both of its termini, or to extend any branch or branches from any point on the same, or to change the gauge of its road, or in any other respect not inconsistent with the provisions of this act, as it may determine, and upon such vote said company may make articles amendatory of their original articles, which shall be signed and certified by the president and secretary of said company, and under its corporate seal; and when the same shall be so signed, sealed and certified and filed with the Secretary of State, they shall have the same force and effect as though such alterations or amend-

ments had been included in, and made a part of, the original articles of association. Articles of association filed in pursuance of this act, with all such subsequent alterations and amendments thereof, and the affidavits annexed thereto, shall be forthwith recorded by the Secretary of State, in a book to be provided by him for that purpose at the expense of the company filing the same, and whenever any articles of association shall be filed as above provided, the company filing the same may at once proceed to construct, operate and maintain its railroad or any section or portion thereof, and to exercise its powers and privileges, and also to assess, levy and collect such assessments upon such stock as at that time, and from time to time, may be subscribed for such purpose, as said company shall determine."

* * * * *

"In 1891, by Act No. 90, Section 9 was amended so as to read as follows:

"Section 9. Every such corporation shall possess the general powers and be subject to the liabilities and restrictions following, that is to say: * *

Ninth. To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor; but such compensation for transporting any passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, shall not exceed the following prices, viz.: For a distance not exceeding five miles, three cents per mile; for all other distances, for all companies the gross earnings of whose passenger

trains, as reported to the commissioner of railroads for the year one thousand eight hundred and eighty-eight, equalled or exceeded the sum of three thousand dollars for each mile of road operated by said company, two cents per mile, and for all companies the earnings of whose passenger trains reported as aforesaid, were over two thousand and less than three thousand dollars per mile of road operated by said company, two and a half cents per mile, and for all companies whose earnings reported as aforesaid were less than two thousand dollars per mile of road operated by said company, three cents per mile: *Provided*, That in future, whenever the earnings of any company doing business in this State, as reported to the commissioner of railroads at the close of any year, shall increase so as to equal or exceed the sum of two thousand or three thousand dollars per mile of road operated by said company, then in such case said company shall thereafter upon the notification of the commissioner of railroads, be required to only receive as compensation for the transportation of any passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, a rate of two cents and a half, or two cents per mile as hereinbefore provided; *Provided*, That roads in the Upper Peninsula which report as above provided passenger earnings exceeding three thousand dollars per mile, shall not charge to exceed three cents per mile, and roads reporting less than three thousand dollars per mile shall be allowed to charge not to exceed four cents per mile; *Provided, further*, That one thouand mile tickets shall be kept for sale at the

principal ticket offices of all railroad companies in this State or carrying on business partly within and partly without the limits of the State, at a price not exceeding twenty dollars in the Lower Peninsula and twenty-five dollars in the Upper Peninsula. Such one thousand mile tickets may be made non-transferable, but whenever required by the purchaser they shall be issued in the names of the purchaser, his wife, and children, designating the name of each on such ticket, and in case such ticket is presented by any other than the person or persons named thereon, the conductor may take it up and collect fare, and thereupon such one thousand mile ticket shall be forfeited to the railroad company. Each one thousand mile ticket shall be valid for two years only after date of purchase, and in case it is not wholly used within the time, the company issuing the same shall redeem the unused portion thereof, if presented by the purchaser for redemption within thirty days after the expiration of such time, and shall on such redemption be entitled to charge three cents per mile for the portion thereof used.

"This act is ordered to take immediate effect.

"Approved May 21, 1891."

United States Supreme Court
FILED
MAR 6 1899
JAMES H. McKENNEY,
Clerk

No. 227.

Supreme Court of the United States

OCTOBER TERM, 1898.

Brief of Pond for P. E.

No. 227.

Filed Mar. 6, 1899.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,
vs.
HENRY C. SMITH,
Relator.

ERROR TO THE SUPREME COURT OF MICHIGAN.

Brief of Argument of Ashley Pond for Plaintiff in Error.

The case below was begun by an alternative writ of mandamus requiring respondent to issue to relator an one thousand mile ticket, good for use by himself and wife at any time within two years from the date of its issue.

The relator's claim of right to the issue to him of such a ticket is based upon a statute of the State of Michigan, in the form of an amendment to an act of the legislature of said State, entitled:

"An act to revise the laws providing for the incorporation of railroad companies and to regulate the running and management and to fix the duties and liabilities of all

railroad and other corporations owning or operating any railroad in this State."

The amendment in question, adopted in 1889, is as follows:

"That one thousand mile tickets shall be kept for sale at the principal ticket offices of all railroad companies in this State, or carrying on business partly within and partly without the limits of this State at a price not exceeding twenty dollars in the Lower Peninsula and twenty-five dollars in the Upper Peninsula. Such one thousand-mile tickets may be made non-transferable, but whenever required by the purchaser, they shall be issued in the names of the purchaser, his wife and children, designating the name of each on such ticket, and in case such ticket is presented by any other than the person or persons named thereon, the conductor may take it up and collect fare, and thereupon such one thousand-mile ticket shall be forfeited to the railroad company. Each one thousand-mile ticket shall be valid for two years only after date of purchase, and in case it is not wholly used within the time, the company issuing the same shall redeem the unused portion thereof, if presented by the purchaser for redemption within thirty days after the expiration of such time, and shall on such redemption be entitled to charge three cents per mile for the portion thereof used."

The judgment of the court in which the case originated —the Circuit Court for the County of Lenawee—was in favor of the relator, which judgment was affirmed by the Supreme Court, and the case comes here by writ of error to that court allowed by its Chief Justice.

While concurring in the argument of my associate upon all points covered by his brief, I confine my discussion in this brief to a single proposition, to wit:

The statute in question is violative of the Fourteenth Amendment to the Constitution of the United States in

this, to wit: that its enforcement would operate to deprive the respondent of its liberty within the meaning and intent of said amendment.

I. That such statute, if enforced, would deprive respondent of its *freedom* to contract is too clear for argument. It seeks to compel railroad companies to enter into contracts with such persons as may demand the same, to carry them and members of their families, at a fixed rate, for the term of two years from the time of demanding such contracts.

But that to deprive one of his *freedom* to contract is to deprive him of his "*liberty*" within the meaning and intent of said amendment is settled by *Allgeyer vs. Louisiana*, 165 U. S., 578.

In that case, a statute which prohibited the contract there in question was held violative of the Fourteenth Amendment upon the ground that the effect of such prohibition was to deprive the defendant of his liberty.

It is true that that case differs from the case at bar in two respects, to wit:

1. The statute there under consideration *prohibited* the making of the contract in question, while here the statute *requires* the making of the contract.

2. The respondent in that case was a natural person, while here it is a corporation.

But I submit that these differences are wholly immaterial.

1. A statute compelling one to make a contract just as much deprives him of his liberty to contract as does

a statute prohibiting him from entering into a contract. This proposition, I submit, calls for no argument to sustain it.

2. For the purposes of the argument, it may be conceded that a statute prohibiting a corporation to enter into a contract might be valid, while a statute prohibiting a natural person from making a contract of the same kind would be invalid as violative of the Fourteenth Amendment. The reason is clear: The power of a corporation to contract is wholly statutory. It can make such contracts only as by statute it is authorized to enter into. Hence, as the legislature gives the power, the legislature, where power to repeal or amend the charter is reserved, can take it away or restrict its exercise. The only limit to the exercise of the power of the legislature in that regard, if any, is that it must leave with the corporation the right to make such contracts as are vitally essential to enable it to carry on the business to carry on which it was created and exists.

But to prohibit a corporation from making contracts, and to compel it to enter into contracts, are, I submit, quite different things.

To prohibit the making of a contract, if the prohibition is contained in the charter as granted, is, in effect, to exclude the existence, by implication, of the power. If by way of an amendment to the charter, is in effect the withdrawal of a power theretofore expressly or by implication granted.

While to *compel*, by an amendment to the charter, is to add to the obligations imposed by the charter.

Obligations may, I do not question, be thus added, but they must, I submit, be such as might, within constitu-

tional principles, be imposed upon natural persons engaged in carrying on the same kind of business. In other words, a corporation, in carrying on the business which it exists for the purpose of carrying on, is as much within the protection of constitutional provisions and principles as is a natural person engaged in the same kind of business.

Undoubtedly, in granting a charter, a legislature may impose such arbitrary conditions as it may see fit. For illustration: in granting a charter for a railroad company, the legislature might make it a condition to the exercise of the franchises granted that the company should carry passengers and property at actual cost, and if corporators could be found to accept such charter the corporation would undoubtedly be bound to comply with the condition. But if a charter should be granted and accepted without such a condition, it could not, I submit, afterwards be imposed, although the charter reserved power to amend. In the exercise of that power the corporation could not be compelled to carry passengers at a less rate per mile than the natural persons, its corporators, could be so compelled were they carrying on the business or like business without corporate organization.

II. The power of the legislature to enact the statute in question is not attributable to the fact that the parties to be affected by it are corporations whose charters are subject to repeal and amendment.

Such power, if it exists, arises out of the nature of the business carried on by such corporations. It is the same power as that exercised in prescribing the rates to be charged for the transportation of passengers and proprety by common carriers, to wit, that such carriers have voluntarily entered upon a business in which the public

is interested and thereby given the public, represented by the legislature, the right to regulate such business. *Munn vs. Illinois, 98 U. S., 113,* and numerous subsequent cases.

It follows, I submit, that if the legislature can compel railroad companies to make arrangements such as are here in question, it can, by the same token, compel natural persons, carrying on the business of common carriers, including ferrymen, hackmen, draymen, etc., to make like contracts. It can compel elevator owners to make contracts. whenever applied to in that behalf, to receive and store grain, at a fixed rate, for any definite period in the future.

It cannot reasonably be contended that a like statute, applicable to natural persons, could be sustained as a legitimate exercise of the police power.

Compelling common carriers, whether corporations or natural persons, to enter into contracts such as are here in question would in nowise tend to the preservation or protection of life, or to the promotion or protection of the health or morals of the public or of individuals, or the promition or welfare, or even the convenience, of the public or individuals, or to prevent common carriers, whether corporations or natural persons, from using their property to the injury of the public or individuals. But legislation to accomplish the objects thus indicated exhausts, I submit, the entire jurisdiction of the legislature under the police power.

I submit that *Allgeyer vs. Louisiana, supra,* is in point and conclusive against the validity of the statute in question.

III. The scope of the power sought to be exercised by the statute is a strong argument against its possession by the legislature.

1. If the legislature can require railroad companies to make contracts to carry passengers for a fixed rate for two years, it can, I submit, require them to make such contracts for a period of ten years, or twenty years, or more.

2. If the legislature can compel railroad companies to enter into contracts to carry passengers at a fixed rate in the future, it can require them to enter into like contracts to carry freight.

Answering the first of these propositions in a brief presented to the Circuit Court, one of the learned counsel for relator said:

"I concede the conclusion of the learned counsel, only modifying it by the condition that the time fixed *must be within the bounds of reasonable discretion.* (Italics his.)

And the same counsel gave a similar answer to the second proposition.

The theory thus suggested, to wit, that the courts could pass upon the reasonableness of legislation in the direction under consideration, struck me at first blush as somewhat novel, and upon examining Judge Cooley's "Constitutional Limitations," I found it evidently would have been considered novel by him. Here is what he says bearing upon the subject:

"Where the power which is exercised is *legislative* in its character, the courts can enforce only those limitations which the constitution imposes, not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism and sense of justice of their representatives." *Constitutional Limitations*, p. 154.

I submit that the judgment below should be reversed.

ASHLEY POND,
Of Counsel for Plaintiff in Error.